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EXCLUSION OF WITNESSES FOR UNBELIEF.

Whether an atheist ought to be admitted as a competent witness.

In answer to the article of S. G., published in the Law Reporter, vol. I, page 345.

The testimony of a witness must be given under the sanction of an oath. This oath, invoking the Deity so to help the witness as he may tell the truth in the case, has no efficacy, as a religious ceremony, to the disbeliever in a deity. Hence the law refuses to admit the testimony of an atheist.

Is this refusal just? Does it deprive the individual, the state, or the community of any rights or advantages? And if so, is the rule, with its attendant evils, *necessary* for the avoidance of greater evils?

I shall adopt the order pursued by your correspondent, and consider the subject, 1st as regards the atheist himself, 2d as regards the state, 3d as regards private citizens not being atheists.

1. *As to the atheist.*—Here the manifest injustice of the rule has prevented its general adoption. The law does not allow "the objection of infidelity to be made against any man seeking his own rights in a court of justice." It permits him "to make affidavit in his own cause to the absence of a witness, or to hold to bail, or to the truth of a plea in abatement, or to the loss of a paper, or to the genuineness of his book account, or to his fears of bodily harm from one against whom he requests surety of the peace," and to take the poor debtor's oath. But the law deprives him of a right enjoyed by the rest of the community and which is dear to the feelings of every honest man; that of going upupon the stand as a witness and telling the truth for the protection of innocence and the attainment of justice. If the fortune of his neighbor is involved in a suit, whose important facts are within his knowledge, he must stand by in silence and see that neighbor ruined. If his father is charged with a murder, he has no power to prevent his conviction, though he knows that he was at another place at the time the murder was committed. If the honor of a sister is assailed by a villain, and he is the only witness of the fact, the law, which forbids him to punish the offender according to the dictates of nature, also denies him the means of doing so at its own tribunals! And if no neighbor, or near relation, or dear friend is concerned, but a mere stranger, a member of the great human family, is involved in a controversy, it is at once his duty and his pleasure to be the means of justice, by communicating what he knows at the trial: and most tyrannical are those laws which, without good reason, deprive him of that noble satisfaction.

2. *As to the State.*—"If the State," asks your correspondent, "does not think proper to summon an atheist to testify, what right has he to complain? It is not his cause, but the cause of the state." It is true that the prosecution of a criminal is conducted in the name of the state, but the traveller who has been robbed, the citizen whose house has been set on fire, and the father whose son has been murdered, feel a strong, proper, and natural interest in the trial: an interest which the law approves and cherishes, and to which it entrusts the prosecution of crime; refusing to pay common informers to hunt up criminals. Nor do I agree that "the objection that the disability of the atheist to testify, serves to invite personal or private aggression against him, is quite too speculative and fine spun." If the atheist cannot testify against the robber, will not the robber be emboldened to attack him? What will prevent his personal enemy, who happens to be the strongest, from way-laying him and attacking him in private? Will it not remove a restraint from the lawless passions of the ruffian, that the woman he is about to assault is an atheist who cannot testify against him? And is a human being, a good member of society, who respects and obeys the laws, to be deprived of the same protection they give to others, without any crime or fault of his own? Is it nothing to the state that crimes are thus

increased. If such cases seldom occur, it is only because atheists are exceedingly rare.

3. *As it regards other persons.*—The discovery of truth is the object of judicial trials. Every litigant is entitled to the testimony of every man who knows any thing of his case, and whose testimony will advance the object of the trial. If I lend a thousand dollars in the presence of an atheist of pure life and character, ought I to lose that sum on the trial because the man who borrowed it, objects to the testimony of the witness? If there are so few atheists in the world that this case will not be likely to occur, then surely no evil could arise from the abolition of the rule which rejects the witness.

It is said, that "should a case arise, in which a person accused of a crime, is unable to defend himself, because his sole witness is rejected for atheism, it would furnish proper ground for executive interference by a pardon." But if the witness is not to be believed in court, his story is not to be listened to in the executive council. Why reject his testimony before the judge and jury, and admit it before the governor? The executive, in administering the pardoning power, must act *judicially*, and ought not to admit testimony unworthy of belief.

Again: "If it is a civil contract, the facts known to the atheist are of course equally well known to the adverse party who may always be compelled to disclose them by a bill in equity for a discovery." But in many of the United States, the chancery powers of the courts are confined mostly to cases of fraud and trust, and do not extend to civil contracts generally. And even if an answer under oath could in all cases be obtained, it would be a hardship to the plaintiff, to be compelled to take the answer of the defendant as true, and not to have the liberty to contradict, qualify, or explain it, by the testimony of the witness. Under the present law, if one of the witnesses to a will happens to be an atheist, the will is void. It is urged that the rights of the testator and legatee are not violated; that the testator *might* have made his will in the presence of unexceptionable witnesses; that if he neglects this he neglects his duty; but that it is not the fault of the law. But if the rule is unnecessary *it is* the fault of the law that the will is void, and that the property does not go according to the *intention* of the testator. No man in the world knows all the points of the law; there are but few who know a thousandth part of them. The law ought, as far as possible, to be so consistent with reason, that he who follows the maxims of common sense, will keep within its provisions. After the law has set a snare for the citizen, it is but a poor apology to tell him that with proper care he might have escaped it.

The rejection of a witness in a case between third persons, is inconsistent with the admission of his affidavit in his own case. He is permitted to procure a continuance by making affidavit to the absence of a witness; he is allowed to make affidavit to the loss of a paper, and thus let in and make out his case by secondary evidence; he is allowed to free himself from prison and escape the grasp of his creditor by taking the poor debtor's oath. In all these cases, though he testifies in his own favor in opposition to the rights of others, he is admitted. With what propriety then, can he be rejected in a case where he has no interest.

If no atheists exist, the law which rejects their testimony is unnecessary; if they do exist, the hardships and evils of the law are numerous and apparent.

Is the law so necessary that it ought to be preserved in the face of these evils?

The law relies on the testimony of a witness for several reasons: because he has all the motives for telling the truth on the stand that he has off of it; because to these motives are added the publicity of the occasion, its solemnity and importance—all insuring reflection and care—because the witness can be cross-examined by the opposite party, and the accuracy of his knowledge, and his disposition to tell the truth fully tested—because the jury can observe his appearance upon the stand, and his manner of testifying, and thus judge of the truth of what he is saying, and because he testifies under the pains and penalties of perjury. Lastly because to all these sanctions the oath is superadded.

Now all but the last, exist in the case of the atheist, and each of the others is more important than the last. The oath is required, merely because it is considered an additional security which can be had without trouble or expense; not because it is supposed the witness would not tell the truth without it. There is not one case in a hundred where the individual taking the oath consid-

ers himself as invoking the vengeance of the Deity upon him if he speaks falsely. He does not even think whether there be any Deity or not. He considers himself complying with a mere form, necessary to make him competent to testify. The oath as a general thing is of little importance, and even of doubtful utility. The atheist takes the oath with the rest. He may consider it a mere form. So do others who take it. It subjects him, as it does them to the pains and penalties of perjury.

Firmly believing in the existence of a superintending Deity, and in a future state of rewards and punishments; fondly clinging to that belief, and shrinking with horror from the idea of annihilation; yet I cannot see in a different opinion any evidence of mental alienation or moral depravity. *The law does not require belief in a God, because it is declared in scripture.* The law requires no belief in revelation. The pagan, and the man born in a christian land, who reject the authority of the scriptures, are both competent witnesses. A man's testimony is then rejected simply because, *from the light of nature*, he does not discover the existence of a Deity.

May he not honestly differ on this subject from the majority of his countrymen, and still feel all the charities of life, and acknowledge and strictly fulfil all his duties to society?

Let us examine for a moment the reasoning by which the existence of a God is proved by one of the soundest and most acute of philosophers, Mr Locke, the great champion of christianity, whose writings form an era in the history of the human mind; who freed philosophy from the jargon of the schools, and made her the handmaid of truth and virtue.

He reasons thus:—

"Something exists, and this something could not have been made out of nothing. Therefore something must have existed from all eternity. Moreover, we have *perception* and *knowledge*, therefore cogitative beings exist. And cogitative beings cannot have been made of senseless matter; therefore some cogitative being must be eternal. That nothing, that is the negation and absence of every thing, should have produced something is revolting to reason; that God, that eternal cogitative *something*, should have formed all things out of nothing, 'by the word of his power,' is less revolting, though still *inconceivable, and we adopt it because it is more easy to be believed than any other supposition.*"

Now follow the train of reasoning, and see if it has any thing so *certain* and *conclusive* that a man who differs in opinion from you or Mr Locke, must be so deficient in mental or moral perception, that he is not to be believed as to a matter of fact within his knowledge, when solemnly examined as a witness. Most men will agree with Mr Locke, that the last proposition is most easily believed, yet who shall condemn the man who *doubts*, and is unable to believe what is acknowledged to be *inconceivable*, and is declared to be only less revolting than that which is treated as an absurdity.

One of the strongest arguments to support the truth of revelation, is that it was *necessary* in order to unfold to mankind the existence of a God, and a future state of rewards and punishments; which could not be discerned with sufficient certainty from the dim light of nature. Why then does the law, *which does not require a belief in revelation*, demand a belief in those facts which the champion of christianity declares, can be satisfactorily discovered in no other way?

In rude times and countries, men have generally, though not universally, believed in the existence of beings superior to themselves, who controlled their destinies; but they have discovered them in the stones, the woods, the winds, the floods and the heavenly bodies. In countries of civilization and learning, metaphysicians have in modern times satisfied themselves of the existence of one God; but it has generally been by a difficult if not obscure process of reasoning which it has taken them years to devise, and which it takes an ordinary man quite as long to understand. Is a good citizen, whose character for truth is unimpeachable, to be deprived of the privileges and advantages of a citizen, and singled out by the law as an object of distrust, because he cannot jump with the heathen at a belief in the divinity of the moon, and cannot follow modern philosophers through those voluminous and learned wanderings, in which they and their readers are usually lost together. As well might the law forbid to the common farmer and mechanic the use of common arithmetic; the

rules of addition, subtraction, multiplication and division, in the common business of life, because they cannot read Newton's Principia, or follow La Place through *the Mecanique Celeste* or the *Systeme du Monde*.

Before the discovery of that blessed principle of toleration under which the nations of christendom are now reposing, while the government considered it a duty it owed to God to persecute all dissenters, men were often burned at the martyr's stake for being unable to believe, and being unwilling to feign a belief in some article of faith, usually an imcomprehensible dogma, which happened to prevail at that particular time and place, but which was rejected in other countries, and has been frequently abandoned since as absurd, in the very country which once enforced it with fire, sword, and axe.

While we shrink with horror from all persecutions, equal in *degree*, why do we retain a law which is similar, or at least bears a resemblance in *kind*? Let us not subject our holy religion to the imputation of such injustice. This law makes no converts to our religion, its effect is to arm our enemies with that activity usually attendant on a sense of injustice. Religious belief is now determined by the *understanding* of the *man*, not by the penalties of the government.

We are referred to the history of revolutionary France. Was not that revolution caused by the refusal of the church and the government to reform those abuses in both, against which the progressing spirit of the nation rebelled? They clung to their abuses, and their whole system went down together, in blood and confusion. The best way to preserve a good thing, is to make it perfectly good.

The atheist entertains a different *notion* from his neighbors, on an incomprehensible subject, where the profoundest speculations of reason are nothing but probable conjecture. Does this create even a *presumption* that he will think differently from them on subjects within the reach of all—the duties of life, the beauty, and fitness of truth, and the importance of speaking it in a court of justice?

"The human understanding," says Locke, "cannot grasp all the mysteries of nature and religion, nor can the sailor's line reach the bottom of the ocean; but when the water is so deep that his line cannot reach the bottom, there is no danger that his ship will run upon a rock." So the mind which is lost in unfathomable subjects, is capable of guiding us in the common affairs of life.

Experience does not teach us that the atheist is less likely than other persons to speak the truth. The example of the American Indian is inapplicable, for he believes in a Great Spirit who rewards and punishes. Most rude nations believe in superior beings. The few remote, barbarous and ignorant tribes, who are said to have very little, if any idea of a God, are too little advanced in the scale of humanity, to form a just criterion by which to judge of enlightened men. And it is certain that the rudest barbarians are often attached to truth, though destitute of many other virtues. The Suffee, the atheist of Persia, is not always a man of truth; but is the Mollah who believes in Allah and Mohamed?

It is said that the histories of Hume and Gibbon are nearly, or quite destitute of authority as to matters in which their interests or passions were concerned. That may be. But is it not so with the histories of the monks? Who looks to any work as authority, written by a man whose interests or passions are concerned?

The rejection of the atheist as a witness, is placed on the same ground as the rejection of a parol evidence, to prove a contract which the law requires to be in writing. But the cases are widely different. As it is important that certain contracts should be in writing, the law requires them to be written, and, as a means of enforcing its own provisions, refuses to receive any other evidence to prove them. The contract can be easily written, but the atheist cannot change his belief. The law may compel him to be a hypocrite, but cannot compel his mind to receive that which it rejects. Parol evidence is rejected from policy, and not because in its nature it is in general insufficient to satisfy a jury. But the testimony of the atheist is rejected either because it is deemed likely to mislead the jury, or as a means of punishment or compulsion, at the price of the rights of the party who needs his testimony. The party adverse to that which calls a witness upon the stand can show, (if it is a fact) that he is not deemed a man of

truth in his own neighborhood, he can have him punished for perjury if he testifies falsely, he can cross-examine him in the presence of the jury, he can comment if he please upon his religious belief, and the weight of his testimony will be left to the jury.

Let every man who is offered as a witness, and to whom there is no objection of interest or infamy be sworn and examined, without the power in any one to enquire into his religious belief or metaphysical opinions. He may hold an oath more or less sacred and important, from religious belief, habitual carelessness, dullness of intellect, or bluntness of moral perception; but these are not reasons why his testimony should be rejected; only why it should be weighed.

It is seldom that a counsellor of any court in this country is disposed to inquire into religious opinion, or if disposed, dares, by doing so, to violate the liberal sentiments of the jury.

Since this law, if it does not violate the express provisions of our state constitutions, is inconsistent with their spirit, and at war with the principle of universal toleration, which is the pride and blessing of our country, is inconvenient to the state, and unjust to the individual and to third persons, and will be felt to be so wherever it operates, it ought to be removed from the books.

TITUS.

OPINIONS OF COUNSEL.

BILLS OF EXCHANGE—EQUITY—TRUST—LIEN—VALUE OF THE POUND STERLING.

CASE.—A, the agent of W. & Co., grants to B. a letter of credit. B. at the same time makes an engagement in writing, which appears on the back of the said letter of credit[1]. D. & Co. as the agents of B, draw the bills payable in London, which are protested for non-payment, and D. & Co. take them up, or procure a friend to purchase them, as the case may require. With the bills, property is purchased, which is consigned by D. & Co. to W. & Co., and was received by A their agent at Boston, and is now held by him. Both B. and W. & Co. are insolvent, and B. has assigned his interest in this property so that it cannot be attached by the trustee process. 1st. Can D. & Co. reach this property in the hands of A, through the aid of a court of chancery? 2d. How would the court fix the value of the pound sterling?

OPINION.—It seems quite clear that there is a trust in favor of B, who is the general owner of this property, to have its proceeds applied in payment of these bills. Such is the clear result of the contract under which the property was received by A. The object was to secure the performance of B's engagement to place funds in the hands of W. & Co. in London, or of A. in Boston, to pay these bills, and failing in the performance of this engagement, it cannot be doubted that it was the intention of the parties that the proceeds of this property should be the fund out of which the bills should be paid, and against which they may be considered as drawn, inasmuch as it was a part of the original contract that this property should be consigned to them or their agent, and in the ordinary course of events, it would come to their hands before the bills would be at maturity. We think, therefore, that W. & Co. and their agent, received this property clothed with a trust, and that even in the case of a bankruptcy of W. & Co., B. would have a clear right to require them or their assignees, or any person who received the property under the bill of lading with the notice of the facts, to apply the proceeds of the property to the payment of the bills. The case of *Hassall v. Smithers*, (12 Ves. 119) is directly

[1] The letter of credit and agreement referred to were as follows;

Letter of Credit for a sum not exceeding £2000 st'g.

Boston June 7, 1836.

Mr. J. T. about to proceed to the East Indies (or in his absence, Messrs D. & Co., Port Louis,) is hereby authorised to draw on Messrs W. & Co. of London, at six months sight, for any sum or sums not exceeding in the aggregate two thousand pounds sterling, and such draft shall be duly honored on presentation at the banking house of the drawees in London.

This credit being for account of B. of Boston, and to continue in force eighteen months from the date hereof. Bill of Lading to be made to the order of W & Co. and to accompany the draft on London. One copy also to be forwarded to A. Boston.

Boston, June 7, 1836.—Received of A., attorney to W. & Co. of London, a letter of credit issued in conformity to my request, a true copy of which letter of credit is on the first page of this paper.

I hereby agree to place Messrs W. & Co. in funds on or before maturity, to cover such draft or drafts as may be drawn under said credit, together with a bankers commission of one per cent., and any charge for interest &c. that may be incurred: or I will settle the amount of said draft or drafts here, upon receiving notice to that effect from them or their attorney, provided I have not previously remitted the house in London for the same.

in point. A person in this country drew bills on a person in London, and remitted notes and bills towards providing for the bills which he had drawn. The acceptor of the bills in London died before the money and bills sent arrived, and the money and bills were received by his administrator. The Master of the Rolls decided that the intestate would have been bound to apply the remittance if it had got to his hands, in discharge of the bills; that he had no option, even if he had been a creditor at the time on other accounts, to apply that fund to any other demand; that if the intestate had been a bankrupt, property in his hands under such circumstances, would not have passed to his assignees, but would have been applicable to the bills, to answer which, it was specifically remitted. We are of opinion also, that this trust extends to the holders of the bills, and may be enforced by them. If the proceeds of this property are looked on as the fund against which these bills are drawn, it is clear that the drawing of the bills by B. or any person in his behalf, operates in equity as an assignment of the fund on which the bills are drawn, and gives the payees of the bills a lien thereon. (2 Story's Eq. 308, 309, 310, 311. 5 Paige 632.) And we know no reason why this equity should not extend to the holders of the bills which are negotiable, especially in a court of equity, which finds no difficulty in allowing to assignees, even of contracts not negotiable, the same equitable rights as were possessed by the assignors. But even if this principle be not applicable to the case of endorsees of bills of exchange who have taken the bills without notice of the existence of the particular fund in question, there is another principle of equity, which would lead to the same result. W. & Co., when they agree to accept these bills have no funds of the drawer, they agree to accept for B's accommodation, and they are in the first instance, and until funds are placed in their hands, the sureties of B. This property is placed in their hands to indemnify them against the obligation which they have entered into for B's accommodation, and it is well settled, that where a principal has given to his surety securities or property for the indemnity of the surety, the creditor is entitled to the benefit of it, and may in equity reach such security to satisfy his debt. 1 Story's Eq. 481, 592, 593. *Mann v. Harrison* (1 Eq. ab. 93, k. 5.) *Wright v. Morley* (11 Ves. 21.) *N. London Bank v. Lee* (11 Con. R. 112.) *Homer v. Savings Bank*, (7 Con. R. 478.) We have thus far considered only the equities of B and the holders of the bills. But we are also of opinion that D. & Co., who drew the bills as B's agents, and became liable on them for B's benefit, have a right to insist on the application of this property, to the payment of the bills, and that a court of chancery, with the proper parties before them, would enforce this application at their instance.

In the case of *Pratt v. Law*, (9 Cranch 458) it was held by the supreme court of the United States, that where three persons mortgaged their joint property to secure a claim, each engaging to pay one third, and one paid the whole, on the refusal of the other two to pay, the person paying acquired an equitable lien on the joint property mortgaged. And this case is only an application of a very general and well settled principle of equity, that any surety who is compelled to pay a debt, has an equitable right to avail himself of the property of the principal which has been pledged to pay the debt, for which he was surety. It is clear that D. & Co. are B's sureties. They agree to pay money for B's benefit, provided W. & Co. fail to pay. W. & Co. refuse to pay, but they have property of the principal placed in their hands, to enable them to pay, which was specifically pledged for this purpose and which under the circumstances, constituted the fund on which the bills were drawn, and we think a court of chancery would hold that D. & Co. had, under these circumstances, a lien on these funds.

The next question is, "how would the court fix the value of the pound sterling?"

This involves the consideration and application of principles of law not of frequent occurrence, nor without difficulty. The leading principle in relation foreign contracts is, that the contracting party binds himself by the obligations of law prevailing in the place where the contract is *to be performed*; that is supposed to be "the place of the contract," and in the interpretation of contracts, the law and custom of *the place of the contract* are to govern. If, then, a contract is made in one country for the payment of money, or the delivery of goods in another, the value of

the money or goods in the latter ought to be taken as the measure of damages, if the contract is broken. So if a foreign merchant purchase goods, or make advances, or give security for a correspondent in another country, the party so advancing will be entitled to re-payment at his own domicil, with the interest or other damages allowed by the law of that place, unless some other place of payment is stipulated. In the present case, D. & Co. became the drawers of bills, for B's accommodation, payable in London; in consequence of thus assuming a liability for him, they have been obliged to pay the amount of the bills in London; and for this, they are entitled to a full indemnity. The expense of placing moneys in London to discharge their obligation, was 20 per cent., or one fifth of the amount added to the face of the bills. Are they not as justly entitled to recover this expense as any other part of the sum they have paid? Surely if they are not, they will not realize a full and adequate indemnification for the damage they have sustained. Some doubt on this point arises, from a decision by the supreme court of Massachusetts, that when a suit is brought here by a foreign creditor to recover money payable in England, the judgment can be only for the amount due at the par value of lawful money for sterling. At the date of that decision (1829) the par value of the pound sterling, as fixed by act of Congress (1799 ch. 128) was $4 44. Since then it has been raised by the same authority to $4 86 (Acts of June 28, 1834) or in other words the inequality of value between gold and silver coin which existed before, is corrected; the pound sterling, which is equivalent to the sovereign, being the representative of so many grains of gold, which are declared by Congress to be of the value of $4 86 cents American currency. If, then, a foreign creditor should hereafter sue in our courts for the recovery of a debt, due in pounds sterling, it appears to us certain, that he could not be restricted to $4 44, even on the principles of the decision in 8 Pickering's Reports, referred to above, but must recover at least $4 86. But if the foreign creditor by the breach of the American debtor's engagement to pay him the pounds sterling in London, is entitled to recover any thing, we can see no sound reason for withholding from him the sum which it will inevitably cost him to replace the money which he has paid for the American, in London, the place of payment. If the American has violated his contract, it cannot be said that the foreign creditor voluntarily seeks his money in this country. He is compelled to have this recourse by the bad faith and absence of his debtor from the jurisdiction of the foreign courts; and will the courts by such a judgment, offer a reward for breach of contract? The learned Mr Justice Story, in his treatise on the conflict of laws, ch. 8. sec. 309, states explicitly, that the proper rule for awarding damages in such a case, would seem to be to allow that sum in the currency of the country where the suit is brought, which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the *real* and not by the *nominal* par of exchange; again, that eminent jurist says "in all these cases we are to take into consideration the place where the money is payable; for wherever the creditor may sue for it, he is entitled to have an amount equal to what he must pay in order to remit it to that country," sect. 310. This is the language of justice, and we trust it may be adopted by our court, as the language of the law, when the occasion for revising this subject shall arise.

But whatever embarrassment, a foreign creditor, by the local decisions in this state may be involved in, we do not think that Messrs D. & Co. in this case come within the purview of those decisions. They are not foreign creditors, suing for a debt due to *them* in London, (though in one aspect of the case their situation is analogous) but they are Americans who have been compelled by the force of an engagement of suretyship entered into by them, at the request and for the accommodation of an American, to pay a large sum of money in foreign currency, which has actually cost them the amount claimed by them; and we are of opinion that they would be entitled to recover that amount, as for so much money paid, laid out and expended for the use of their principal; but if the domicil of D. & Co. is taken to be, (as in fact it is) in a foreign country, and they are to be considered as foreign merchants, suing here to recover a debt due to them *here*, then upon the principles laid down by Mr. Justice Story, they would be entitled to recover as many

dollars as the pounds sterling which they have been obliged to remit to London, from the place of their domicil, are worth in that place[1].

C. P. & B. R. Curtis.

Boston, August, 1837.

AMERICAN CASES.

UNITED STATES DISTRICT COURT.

PHILADELPHIA, MARCH, 1839.

The case of "Isaac" or "William Stansbury;" claimed as a fugitive from the service of Ruth Williams, of Prince George County, in the State of Maryland.

E. D. Ingraham for the claimant.

Charles Gilpin and *David Paul Brown*, counsellors of the Pennsylvania Society for promoting the Abolition of Slavery, &c., for the respondent.

Hopkinson J.—The hearing of this case commenced on the 31st day of January last, and has been attended throughout the several sittings with an increasing excitement and interest. There are questions and circumstances involved in it calculated to give it more importance than ordinarily belongs to examinations of this description.

On the one side we have a citizen of a sister state, coming here under the protection and authority of that state, claiming to have restored to her certain property, of which she alleges she has been unlawfully deprived; and insisting upon her right to my order to have this property delivered to her by the injunctions of the constitution of the United States, which I am bound to obey. In the other party, who denies and resists this claim, we have an individual who has lived among us for more than twentythree years—has a wife and family of children depending upon him, and a home, from all which he must be separated, if the claimant has made good her right. These are considerations that make it peculiarly incumbent on the judge, who is to decide the question, and to decide it by the evidence that has been brought before him, to weigh that evidence carefully and scrupulously, without prejudice or influence from any other quarter. He is to yield nothing, on the one side to the power and patriotism of the state of Maryland, which have been strongly invoked for the cause of the claimant; nor, on the other, to any feeling for the consequence of his judgment to the respondent and his family—much less to any opinions of his own on the question of slavery.

Nobody recognizes more fully and firmly than myself the complete legal and constitutional right of the owner of a slave in and to his person and services—no one is more deeply impressed than I am by the solemn guaranty, which those states of our Union, whose laws permit slavery to exist in them, have received and have a right to exact from every other state; that this right shall be faithfully regarded, and that, if a person held to labor or service in one state by the laws thereof shall escape into another, he shall be delivered up to the party to whom such service or labor shall be due. This right it is my duty and desire to respect and secure, not only as a judge, sworn to respect and secure it, but as a citizen of the United States; firmly believing the union of these states to be our first and greatest blessing, and to maintain it, our highest duty; and knowing that it cannot be maintained but by a faithful performance of all its obligations and provisions by all the parties to it. In my view, the happiness of black and white, of the freeman and the slave, is intimately, I may say in our present circumstances, inseparably connected with the maintenance of that government, under which, and by which, we have attained an unexampled prosperity, and have secured to us every right which a national people can wish for or enjoy. I make these remarks, because the topics to which they allude found no inconsiderable place in the argument of this case. I take the occasion, too, to observe, that the experience of this case, as well as many others, has shown that this mode of trial, directed by the act of Congress, is better for both parties, especially for the person claimed as a slave, than a trial by Jury could be. This hearing began on the last day of January—the claimant of course came prepared with the ordinary *pri-*

[1] Act of Congress 28th June, 1834,—Eagle contains 258 grains stand. gold—to be of value $10. All gold coins minted by U. States *before* 1st July, 1834 to pass at 94 cts. 8 a dwt.=to $10 19. English coins, 22 carats fine, to pass at 94 cts. 8 a dwt. Sovereign contains 5 dwt. 3 gr. 5 min.=123 grs. 5 min. a 94 cts. 8 a dwt.=$4 86 8, and is equal to £1 stg.

ma facie proof, sufficient, if uncontradicted, to entitle her to the possession of the respondent. He was taken suddenly in the street, without any notice or expectation of any such design or danger. He could not, therefore, be ready with his proofs and witnesses to repel the claim. It might be necessary to seek for them at a distance, and time was necessary for this purpose. After reading the documentary testimony of the claimant, and examining two of her witnesses, by which the respondent was fully apprized of the nature of the claim, the hearing was postponed, on his application, until the 16th of February. It was then resumed, and the claimant examined another witness, and closed her case. The defence was then entered upon, and several witnesses were examined to support it. Another postponement was granted to the 23d of February, to enable the respondent to obtain other witnesses—and again on the 2d of March, when the respondent examined additional witnesses, and the claimant also produced another. It is obvious that a jury could not have been kept together for this length of time, and that much important evidence would have been excluded by a more hasty conclusion.

I will now proceed to an examination of the case, as it appears on the evidence that the parties have respectively offered; for it is only by that evidence, and not on any surmises or conjectures, conclusions or belief, not founded upon it, that I must raise my opinion. Judicially I can have no belief or opinion about it but such as I can justify by the evidence.

In the power of attorney, given by Ruth Williams, the claimant, to her grandson, William W. Hall, to prosecute this claim, she states that her negro man "Isaac," who calls himself William Stansbury, absconded from her service on, or about the 10th day of February, 1816. We have here an important date ascertained, which we must carry with us throughout the inquiry, which turns so much on the accuracy of dates. The whole question settles down into the question, whether the person now brought before me, and who calls himself William Stansbury, is, or is not the man *Isaac*, who was the slave of William Williams, in his life time, and afterwards came into the possession of his widow, Ruth Williams, and who escaped from the service of Ruth Williams in the month of February, 1816. In short, it is a question of identity of person. This power of attorney bears date on the 19th day of January last, and was executed in consequence of a letter written to Mrs Williams from George F. Alberti, dated at Philadelphia, on the 29th December, 1838.

In that letter Mr Alberti informed her, that he understood she had a slave named Isaac, alias William Stansbury, who absconded from her about the year 1815. He gives the name of Isaac's mother, and tells her, that his features are just the same as usual, and advises her how to proceed to have him arrested and delivered to her. It is no part of my business to inquire how Mr Alberti got his information of a transaction which took place nearly twentythree years before; I mention the letter only as being the commencement of this proceeding. Mr Hall came to this city with his power of attorney and some witnesses to identify the person of Isaac. He was arrested in the street, and brought before me—I have given every opportunity to both parties to settle this question of identity, by their evidence, and will now, briefly as I can, compare the testimony offered, and endeavor to come to a satisfactory conclusion from the whole. Identity can be proved only by inspection of the person, and, when such proof has been given, it may be disproved or discredited by the proof of circumstances absolutely incompatible with it. But such circumstances must be clearly proved; and they must be absolutely irreconcilable with the direct proof of identity, for, if the counter proof is doubtful, or, at least, not brought to a reasonable certainty—or may be consistent with the evidence of identity, the direct and positive proof must prevail—subject, however, to the general and just rule of law which throws the burden of proof on the party who claims the recovery of that which is in the possession of another. If, therefore, the circumstances themselves, and the proof of them be such as to bring the testimony for the claimant into so much uncertainty and doubt, that the mind cannot be satisfied to rely upon it, the legal consequence is that it must fail. In short, the proof of identity by inspection will be sufficient, unless it be wholly discredited or so impeached by contradictory evidence that the judgment cannot be satisfied to depend upon it. The proof of ownership, says the act of Congress, must be

"to the satisfaction of the judge." A conscientious witness will be cautious in his testimony of identity, and take care not to be too absolute and positive in his knowledge of it, for assuredly strange mistakes have been made upon this subject by witnesses, whose honest intentions could not be questioned.

By a certificate from the Register's office of Prince George county, Maryland, it appears that letters of administration were granted to Ruth Williams and James Beck on the personal estate of William Williams, deceased, on the 7th day of October, 1806, and in the inventory of the estate, we find a "boy named Isaac," about ten years old, appraised at $200. The respondent is claimed to be this boy Isaac—and the question is, whether he is or is not.

The first witness examined on the part of the claimant, was *Beale Duval*, whose manner of testifying and deportment throughout his examination was such as to impress us with the entire sincerity of his testimony. This witness now resides a few miles from the city of Baltimore, but in 1806 he resided in Prince George county, and did so until about two years past, about two or three miles from the house of William Williams—knows Mrs Williams—was frequently at her house—there was a considerable family intimacy between them—knew all her servants for many years—he has seen the respondent a vast many times—has seen him at the house of his master and mistress, and at his (the witness) house—he went by the name of Isaac—and was claimed by Mr Williams as his slave to his death—after his death, Mrs Williams always had him in possession—he was born on Mr Williams's place—witness knew his mother—he had a brother, still in the family when witness left the county—don't recollect precisely when he ran away—he has been gone twenty years and upwards—witness said that he had no doubt that the respondent is the boy Isaac—he recognized him as soon as he saw him—he has a mark on his forehead, occasioned by a burn when young.

The cross examination related to the time when the witness heard of the claim now depending—and from whom he heard of it—at whose instance he came here—of seeing the respondent first in the street—when he knew him directly—that he was told by a young man that the respondent was in the street, detailing the place—had not seen him, until then, for upwards of twenty years—thinks that when he went away he was between fifteen and seventeen years of age—he repeated, that he never saw a person he could recognize more certainly—he is not much changed—has a beard now—but had not then—yesterday witness asked him if he knew him—he would not acknowledge it—would not commit himself, or own any of the transactions of which he spoke to him.

William Williams was the next witness. He said—I reside in Prince George county—was born there—at fourteen years old went to Baltimore, for seven years, and then returned to Prince George—know Mrs Ruth Williams—knew Mr Williams in his lifetime—Mr Williams raised me until I was fourteen years old—am now fortysix—he died in 1805 or 1806—knew the boy Isaac from his infancy—he was nine or ten years old when Mr Williams died—left him at the house of Mr Williams when I went to Baltimore, and found him there when I returned—he ran away in 1815 or '16—his mother and two brothers lived there at the same time—witness gave an account of the brother and mother of Isaac—this boy (Isaac) was always claimed by Mrs Williams as her slave after the death of Mr Williams—he had a mark on his forehead, occasioned by a burn—I recognized him as soon as I saw him—I understand he had an uncle named *Nashe* (Ignatius) Beck, who belonged to Joseph Beck—brother of Mrs Williams.

On a cross examination the witness said Mr Williams was his uncle and raised him—that he lived about four miles from Mrs Williams—was at her house two or three times a week—on my return from Baltimore, I saw Isaac at my store and at his mistress's—I spoke to Isaac yesterday—he said he did not know his master or mistress, mother or brother, or the state or county—that he did not know where he was born, nor where he came from.

John Riddle was sworn—He said he resides in Prince George county, Maryland—is fortynine years old—has known him (the respondent) ever since he knew himself—lives three quarters of a mile from Mrs Williams—intimate in her family—knew her people—knew the boy named "Isaac," a yellow boy—we were raised together—I was eight or ten years older than he—he was hired out

—he was claimed by Mr Williams in his lifetime as his slave, and by Mrs Williams after his death—I always undersood she took him as her part—I knew the mother of the boy—she was a slave to Mr Williams—she bought her freedom, and now lives in Washington—the respondent is the same man—is not changed—saw his brother a few weeks ago at Mrs Hall's, a daughter of Mrs Williams—there is a strong resemblance between the brothers—I have no doubt that this is the man—he had a scar over one of his eyes—the witness points to the scar.

Cross examined—I saw him a month or two before he went away—it is twenty odd years ago; about the time the war ended.

With this evidence and the certificate of the letters of administration, and inventory of the personal estate of Mr Williams, the counsel for the claimant closed his case,—but at a subsequent hearing produced Dennis Duval as a witness, whose testimony I shall state here, that the whole of the claimant's evidence may be brought together. He was examined after several of the respondent's witnesses.

He said—that he resides in Prince George county, and has done so all his life—is forty-nine years old—lives about one and a half miles from Mrs Ruth Williams—always intimate in the family, visiting there constantly—knew all her people—knows the boy (the respondent)—knew him at Mrs Williams's house—I recollect his running away—I think he was something like twenty years old—a stout youth—think he had a little mark on his forehead, occasioned by a burn—scalded—have not seen him since until today—I recognised him immediately—can't recollect exactly the year he went away, but thought it was between 1817 and 1820—the fact was known in the neighborhood—he was advertised—I have no doubt that he is the boy.

The cross examination related to the question of his relationship to Mrs Williams, and Beale Duval—he was related to neither, and the witness said, he was to come here as a witness some weeks ago, but was sick—that he came at the request of Mrs Williams, he had no conversation with her on the subject—she never showed him the letter (Alberti's) received from this quarter about the claim, nor did she speak of any—she told me that her servant was here in prison, and asked me if I did not think I should know him—thinks the scar on the forehead was on the left side, but that does not form any part of my recollection of him—his face is familiar to me—he had heard Mr Williams (the witness) after his return home, say that Isaac had a mark—probably I might have asked Williams if he had a scar—I first saw him where he is now—nobody pointed him out to me as the person on trial—the witness said he had been with Mr Alberti and Mr Hall the evening before, and the conversation was about the boy—he does not recollect what he said nor that he told them what he could prove—the witness said that on coming into the court room, Mr Hall pointed out the man to him—he now says, Mr Hall, Williams and myself came into the court room this morning, and I said, "there sits the man"—and on a question, he added, "Mr Hall did not point him out to me, or point his hand towards him"—on a question put by the judge, who reminded him that he had said that Mr Hall did point out Isaac to him, and showed the manner in which it was done, the witness replied—that he was satisfied that he was mistaken, when he said that Mr Hall pointed out the man to him when they came into the court this morning.

I cannot but observe here the confusion and errors which this witness fell into in the course of his examination, not with any intention to impute any improper design to him—I do not believe he had any, but to claim some indulgence for other witnesses who have been treated, for similar mistakes, with great severity. In the first place, as to time, this witness thought that Isaac went away between the years 1817 and 1820, when this event happened in February, 1816—yet I do not doubt that Mr Duval spoke to the best of his recollection. In the second place he stated as a fact that Isaac was advertised, and afterwards admitted that he had never seen the advertisement, that he only heard so—that Mrs Williams was the person who had told him so—now, as a very superior degree of intelligence has been claimed for the witnesses of the claimant, and been the subject of high eulogy, one would suppose that they knew the difference between hearsay, and a fact within their own knowledge, to which only they should testify. But a more remarkable instance of confusion or inadvertency in this witness is, that he said distinctly, that on coming into the court room, Mr

Hall pointed out the respondent to him—he afterwards said he did not, but that he immediately said, "there sits the man,"—and on my question, he said, he was mistaken when he said Mr Hall pointed him out. I recollect no mistake so extraordinary as this in any other witness in the whole course of this examination—a fact was distinctly stated to have happened but two or three hours before it was given in evidence, and then it is withdrawn, the witness saying he was mistaken when he stated it. Again; this witness was in a conversation, the evening before he gave his evidence, with Mr Hall and Alberti, and he did not recollect what he said in this conversation—nor that he told them what he could prove.

I most truly and seriously acquit this gentleman of any improper motives or intention to state a falsehood, or conceal the truth; he was evidently hurried and confused. But if this may happen to one of his standing and intelligence, it should not be visited too harshly upon those who are his inferiors in both, and whose inferiority has been pressed as a reason why their testimony should not be considered of equal or of any weight.

I have thus taken an ample review of the evidence by which Mrs Ruth Williams has supported her claim to the labor or service of the person she has arrested and brought before me, under the name of Isaac, or William Stansbury. If that evidence cannot be disproved, it cannot be denied that it is sufficient to overflowing, to establish her right. It is clear, positive and unhesitating, from witnesses of an undoubted character and intelligence, who cannot be suspected of any wilful misrepresentation, or any careless and culpable indifference to the consequences of their testimony to themselves and to others. They have spoken confidently, what they truly believe, if their testimony and if the fact, that is, of the identity of William Stansbury with the boy Isaac, who ran away from Mrs Williams in February, 1816, be of a character about which mistake cannot reasonably be presumed or believed, it must be admitted that her claim has been well established, and it would be hardly necessary to give any attention to the testimony produced on the part of the respondent. No one, however, of professional experience in trials at law, who has had opportunities of observing the errors which witnesses, of the best character, innocently fall into in delivering their testimony, not only of long past, but of recent transactions, will be willing to say that any evidence, from whatever witness it may come, may not be founded in some mistake. On the subject of the identity of persons, instances have occurred of the most surprising description. They have occurred in relation to brute animals, as well as to men. Controversies have arisen about the property of a horse, and numerous witnesses, of unexceptionable character, have testified for the one side and the other with equal positiveness. On one occasion, I think it was in Chester county—the horse was brought into the court room—was standing in the presence of the witnesses for their examination, when they gave their evidence, without producing the least change of belief in any one of them. The counsel for the claimant, adverting to the respondent's witnesses reminded us, how often highwaymen have escaped by having their confederates ready to prove an *alibi*, by an artful narration of circumstances, all true except as *to the time*. On the other hand, we should also remember the lamentable instances in which innocent persons have been convicted and executed as highwaymen, on proof of identity as positive as that we have in this case; not, I agree, with equal opportunities of knowledge, but with equal good faith in the witnesses.

I well remember a remarkable case, tried in June, 1804, in New York, in which the uncertainty of evidence of identity was wonderfully exemplified; I have since obtained a report of the trial. It was an indictment for bigamy against one Thomas Hoag, alias Joseph Parker. The question was whether the prisoner was the person who, under the name of Thomas Hoag, had married one Catharine Secor, four years before, having another wife, then living. He denied that he was the man, or that Thomas Hoag was his name—and insisted that he was in name and fact Joseph Parker—and that he was never married to Catharine Secor. Numerous respectable witnesses, wholly disinterested, testified that the prisoner had lived and worked with them—that they knew him well—and that he was Thomas Hoag. Among the circumstances by which they knew him was a scar on his forehead, which the prisoner had. Benjamin Coe, one of the judges of the county court, testified that Hoag had lived and worked with him, that he had married

him to Catharine Secor, and he was as much satisfied that he was Thomas Hoag, as that he (the witness) was Benjamin Coe. Other witnesses swore to his identity with equal positiveness. But, what is more strange, Catharine Secor, the woman who was said to be his second wife, swore that she became acquainted with him in September, 1800—that he married her in December 25th, of the same year; and lived with her till the latter end of March, 1801, when he left her. She said, "I am as well convinced as I can be of anything in the world, that the defendant now here, is the person who married me, by the name of Thomas Hoag." On the other side, witnesses equally respectable, swore with equal certainty, that the person was Joseph Parker—and they traced their knowledge of him living in the city of New York from time to time in the years 1799, 1800, 1801, with circumstances that made it impossible that he could have been in the county of Rockland, where the marriage with Catharine Secor was solemnized, at the period of that marriage. So the question stood, and was thus finally decided, two of the witnesses for the prosecution, testified that Thomas Hoag had a scar under his foot, occasioned by his treading on a drawing knife, that the scar was easy to be seen. His feet were exposed to the court and jury, and no scar was there—and there was an end of the question. The prisoner was really Joseph Parker, and was not Thomas Hoag.

But does anybody think of imputing the crime of perjury to the witnesses who swore positively as well as circumstantially, without reservation, that he was Thomas Hoag? By no means. It is then a mistake in the argument to say that if upon the whole evidence of this case the true or most probable conclusion should be, that the respondent is really William Stansbury, and not Mrs Williams's "Isaac," an imputation of perjury, will rest upon her witnesses. We may, therefore, go to the examination of the evidence given on the part of the respondent, without any fear of taking anything, even by suspicion, from the respectable characters of the opposing witnesses.

In order to overthrow or disprove the evidence of the claimant, it is necessary that the respondent's evidence should be more certain, more satisfactory and less liable to mistakes than hers. If they are incompatible, as assuredly they are, if they cannot both be true, then we must take that which can be most safely relied upon. The object is to reach the truth of the case, through and by the evidence, and not to take anything to be truth from any prejudice or preconceived opinions; nor from surmises and suspicions however strong they may be, and whatever disposition we may have to adopt them. For every fact, to which I give my belief, I must be able to say, here is the proof of it.

As a preliminary remark to a review of the respondent's testimony, I will observe, that I have no faith in any one's recollection of dates and time, if he has nothing by which he can ascertain them, but the *mere act of his memory.* On the other hand, if memory acts not upon the insulated point of time, but upon certain circumstances of a character to fix themselves on the memory, and the time of these circumstances, are either of public and unquestionable notoriety, or can be proved by credible written documents, then it is obvious that the evidence is not to *time* but to *facts*, and the time is ascertained by the facts thus proved.

Justice to the respondent requires of me, although at the expense of considerable labor, to give the same careful examination of his testimony that I have given to that of the claimant.

The first witness was *William Butler.* He says he knew Stansbury about the year 1815; was in his company in New York. This is of little importance, for he mentions nothing by which this date is remembered, unless it can be connected with the testimony of Capt. Whippey, so as to be corroborated by it.

George Melburn swears, that he knows Stansbury; has known him ever since the war, and knew him during the continuance of the war. This witness here refers to a circumstance of public notoriety to fix the time of his acquaintance with Stansbury. He speaks of the building of the batteries on the west side of the Schuylkill for defence against an expected attack by the British. He says that he and Stansbury went out together with the coloured people to assist in that work. He is certain they went together, and he knew him a year before that—now it is a fact of general notoriety that the coloured people did go out to work at these batteries, and that this took place in the fall of 1814. If then it be true that the witness and the respond-

ent went out together to this work, putting aside his declaration that he knew Stansbury a year before, it is undeniable tnat he cannot be Mrs Williams's boy Isaac, who did not leave her service until February, 1816; that is, about thirteen months after the work alluded to. The witness adds that he is satisfied Stansbury is the man; he was intimate with him; that is, that he did not only see him on that occasion, but knew him before and after; he says he thinks that he knew him to be employed in throwing wood out of boats in 1811 or '12; to this I pay little regard. On a close cross examination he said nothing that appeared to weaken his testimony, and his manner betrayed no uneasiness of feeling; he gave a simple account of his own history.

Abraham Dutton — Knew Stansbury 25 years ago; he, the witness, was going in a sloop bringing wood to the city, and Stansbury was at the drawbridge throwing the wood out; he fixes the time to be 25 years, because he lived at Mount Holly; it is 27 years since he went there, and he lived there seven years, and saw Stansbury two years after he went there; he knows from his marriage the time he went to Mount Holly. It will be 27 years next December since he was married. This is not very satisfactory as to the time of his first knowledge of Stansbury, although his calculations are pretty accurate, but the defect is in fixing by any circumstances that he did know Stansbury while he lived at Mount Holly. If he is not mistaken in that, all the rest proves that he did know respondent seven years before Isaac left the service of Mrs Williams.

Ignatius Beck. This is a very important witness, and his testimony should be closely examined, for if he has not uttered the most broad and unsheltered falsehoods, Stansbury cannot be the claimant's man Isaac. The appearance of Beck, now far advanced in life, with the proof of it on his gray hairs, was without exception becoming; nor did a very severe cross examination betray him into any impropriety or appearance of feeling. He is the brother of the mother of Isaac who absconded from Mrs Williams; he has sworn distinctly that he knew Stansbury in 1810 or thereabouts; knew him before the war began; is satisfied of it. He then mentions the circumstances by which he fixes the time of his knowledge; he says he moved out of 7th street into St. Mary's street, which was in 1810; that Stansbury, whom he had seen before, came and helped him to unload his furniture, and *he has known him ever since*; that is the man; he had got him to haul wood for him; he was away two or three years after he got acquainted with him, but in 1827 he was here working along the wharves; still we have nothing but his memory, to fix the time of his moving into St. Mary's street; he put this beyond a doubt by producing the receipts of his landlord, Robert Mercer, for rent; the first receipt in a book dated Dec. 10, 1810, for 3 months' rent; another in June 1811, no others were turned to; he said he moved there in the fall of 1810, before the receipt was shown, and he could not read; he says that his sister Amy, the mother of Isaac, came to see him (the witness,) about ten years ago; staid with him about nine or ten months; that he is not Stansbury's uncle: he said from his age and the respect the colored people had for him, they were in the habit of calling him sometimes "uncle Beck," and sometimes "father Beck;" he is 65 or 66 years old.

On cross examination he gave a particular account of the family of his old master, Joseph Beck, of his own manumission and history; he said he understood Stansbury to say that he came from the northward; somewhere about New Bedford; this may be connected with Capt. Whippey's evidence; he stated a fact of much importance; that is, that during the visit of his sister Amy here ten years ago, a visit which continued for nine or ten months, he never saw her and Stansbury together; this is incredible if she was the mother of Stansbury and Beck his uncle.

Unless this old man, so respectable in his appearance and demeanor, and unimpeached by a whisper against his veracity or general character, and contradicted by no one in the particular facts he has narrated; unless the whole of his story is a false and foul fabrication, a series of corrupt perjuries, it is not possible that William Stansbury is the runaway boy Isaac.

Jonathan Judas. He also speaks of the building of the batteries over Schuylkill; he was active in getting the colored people to go out and work; he got the names of those who agreed to go; among them was that of Wm. Stansbury; the witness wrote his name down; this he says is the same person; he

has been acquainted with him from that day to this; Stansbury went out with him; witness says he had the honor of being captain that day; they met, 360 in number, in the State House yard; Stansbury then appeared to be from 20 to 22 years old; never talked with him about the place he came from; witness was born in 1784. Is this all a fabrication? By what testimony, either to the facts themselves or the credibility of the witness, is it proved to be so?

Henrietta Reading—Knows Stansbury and first knew him in 1812, as she believes, from a circumstance that occurred, which was the wedding of Richard Paxson, which was in April, 1813, and of his sister which was on the 1st of May following; she became acquainted with Stansbury the fall before these weddings; has known him ever since. I do not lay much stress on this witness, for although it was proved by the records of the meeting that she was accurate as to the time of the weddings, she has mentioned no circumstance which has enabled her to say that it was the fall before these events that she knew Stansbury—it is mere memory of time unassisted by circumstances, or nearly so.

Amy Curry was brought here on my suggestion; she is the mother of Isaac who absconded from Mrs Williams. I shall say but little of her testimony, as she stood in a most difficult situation, if this is her son. She however clearly and distinctly asserted that he is not. She said, pointing to the respondent—*this is not Isaac, he is none of mine.* She spoke of the mark as being on Isaac's *cheek*, differing from those who said it was on his forehead, as this man's is. It will be remembered that I asked this witness if she belonged to any religious society; she replied she did; to the Methodist. I then made a serious appeal to her conscience and fears if she said any thing untrue—reminding her that it would be no excuse for her that she did it to save her child; she said she knew all this, and persisted in her story. If she has deceived us, she has deceived herself more fatally.

On her cross examination she certainly fell into some contradictions, which may have their effect on her credit; but they were not more striking than those of Mr Dennis Duval. I would shelter them both by the same mantle of charity; she too was somewhat hurried and confused on her cross-examination. She also says that she did not see this man (Stansbury) during her visit to her brother, I. Beck, ten years ago.

The only remaining witness is *Captain Whippey.* He is confined in the debtor's apartment, (from whence he was brought to testify) where the respondent has also been kept. After respondent had been there a day or more, he asked me (says the witness) if I had any recollection of coming from Nantucket, in 1810—his naming the sloop and the master's name, brought it to my recollection, that I was a passenger in her. He told me he was a boy at the time on board of her —I don't recollect anything of this man, but there was a colored boy on board, who ran away from the vessel on our arrival at New York—I asked how he came to know me—he said that hearing my name mentioned in the prison, had led him to ask me the question—the boy, as far as I can recollect, was rather of a lightish cast. The witness then mentioned circumstances which were satisfactory to show that this voyage was performed in the winter of 1810. He also said that he had mentioned these circumstances to no one in the prison. Stansbury mentioned to him the year, the season of the year, and the name of the sloop and her master, all correctly. This is very powerful evidence, unless we may account for it by the supposition of the claimant's counsel, that is, that there is a colored man in the prison to whom all this happened, and that *he* made the communications to Stansbury, to use them for himself. This is an ingenious surmise, but where is the proof of it? If such was the belief of the counsel, it might have been at once verified by sending to the prison, or asking the question of the keeper of the prison, who was here in court with his prisoner. Why did he trust so important a matter to an *argument*, when it was susceptible of *proof.*

One circumstance remains to be noticed, which has been vehemently pressed by the counsel for the claimant. It is certainly not without its importance, although it is claiming too much for it to say it is conclusive on the whole case. It is alleged that the respondent has not either at this hearing or to any of the witnesses, his friends and intimates, ever told who he is or where he came from. This is not strictly correct. Ignatius Beck testifies that he understood from Stansbury that he came from the northward, somewhere

about New Bedford; and if he is the boy Capt. Whippey spoke of, this is not improbable. It would have been more satisfactory to have had a better account of him; but his habitual silence on this subject and the want of more proof in relation to it, is but a circumstance of suspicion, that he has or may have some reason for saying nothing about it;—still it is but a circumstance of suspicion. It cannot prevail against the mass of positive evidence he has brought to prove that whoever or whatever he may be, he is not the slave of Mrs Williams. I cannot adopt the reasoning, that because he does not show where he comes from, therefore he ran away from Mrs Williams;—that because he does not show who he is, therefore he is her boy Isaac. Unless we carry this circumstance out to this conclusion, it cannot avail the claimant, whatever suspicion it may throw on the respondent. What reasons he has for this concealment I do not know; but I cannot say that they have any reference to the claim or right of Mrs Williams. On the contrary they certainly cannot have any such reference, unless her witnesses have one and all sworn falsely.

I will put a familiar case: A man is charged with having stolen property—say a horse—in his possession. On the trial the prosecutor swears positively that the horse is his and was taken from him on a certain day. If the defendant proves by numerous witnesses, to the satisfaction of the court, that he had the horse in his possession one year before the prosecutor lost his horse, and has had him ever since, is it any answer to such testimony to say—you have not shown where you got this horse? Is it not enough to show that it cannot be that which belonged to the prosecutor?

To the witnesses of the claimant I can freely say, you have done no wrong—you have honestly testified to an *opinion*—for it is only to an opinion, which you truly and conscientiously believed; but you have been mistaken in a matter, on a question, as to which many honest men have been mistaken before you; and if you should now be satisfied that you were mistaken, you will rejoice that it has done no wrong. But if I were to discredit the witnesses of the respondent—if I were to treat their testimony as unworthy of belief, I could address no such consolatory language to them. I must say to them broadly and plainly—you are branded and blackened with a foul crime before God and man, volunteered by you in the most unnecessary and wanton manner. You were not called upon to speak at all, if you knew nothing of the case; but if you did speak, you were bound to tell the truth and the whole truth by the most solemn obligations. Dare I pronounce such a condemnation upon these people, unimpeached by any attempt upon their general good character and veracity, or by anything apparent in their conduct here to bring suspicion upon their evidence? In such a case, can I turn them all off as confederates and conspirators with the respondent to defraud the claimant of her property, while I am unable to lay my finger on a particle of evidence or single circumstance to justify or defend such a course toward them? It may be well for counsel—for I presume it was truly his opinion—to dispose of all the testimony given for the respondent, by charging it in mass, to be falsehood and perjury—to have been fabricated by confederates and conspirators. He may be satisfied with his opinion, that the object of the counsel of the respondent is not the truth; but to encourage the poor wretches, (as he designates the witnesses of the respondent,) who have come here in their perjuries; but as I have no such knowledge or opinion, I cannot found a decree upon them, nor in any manner adopt them. Nor can I agree with the counsel, that it is enough to discredit Beck that he is of the same race and color with the respondent. This would put these people in a strange and perilous condition. It would be enough to have a white witness, however connected with the claimant by the ties of neighborhood, friendship, or blood; however united with her in a common feeling and interest for such claims. By the law of this state, which I am bound to administer, in this respect, the black witnesses stand here as entirely competent as the white, and their credit is to be tried by the same rules and principles. I am no more authorized to say, nor disposed to say, that any witness for the respondent is to be discredited because he is of the same race and color with the respondent, than I would be to discredit for the same reason a witness for the claimant. Neither the law nor any sense of justice will warrant any such discrimination. There is one broad line of discrimination between the witnesses of the claim-

ant and the respondent. The first speak of the identity of a person they have not seen for twentythree years, and who was then a youth, and can only deliver an opinion concerning it, they can only testify to recollection—to memory—after a long lapse of time; while the others speak of one they have seen constantly from time to time, for a longer period—who has never been out of their view for any great length of time; and of facts and circumstances, which must be true or false. It would be a strange principle for a court of justice to adopt, in trials of this sort, that no black witness is to be believed—that perjury must be presumed of all of them. The whole examination then is a mere mockery and waste of time.

It may be that these witnesses have imposed falsehoods upon me for truth; for in what case or by what color of witnesses may that not be. But I have no reason to presume it, or to believe it—and I do not. If they have done so, be it on their own consciences. I have done my duty in giving the weight to their testimony to which, in my judgment, it is entitled. I pretend not to look into the hearts of men—to discover the deceit that may be hidden there; nor do I incur any responsibility if I am so deceived.

I confess that during the examination and discussion of the case, I have had, occasionally, doubts and misgivings about the truth of it. I am not even now entirely without them. How can it be otherwise under the pressure of such conflicting testimony? But I feel it to be my duty to decide it by the whole evidence, and by such a comparison and estimate of it, as the rules of evidence have prescribed for cases of contradictory testimony; and not to yield my judgment to surmises and suspicions that I cannot defend by just conclusions from the whole testimony.

In this case I must refuse the certificate applied for, and order William Stansbury to be discharged from the arrest.

UNITED STATES CIRCUIT COURT.

BOSTON, MAY TERM, 1839.

Grant and others v. Healey.

Where a suit was brought for a balance of account for advances made at Boston, upon goods consigned to the plaintiffs at Trieste, and sold by them at a great loss, it was held, that the balance was not payable at Trieste, but at Boston, and, therefore, the balance was to be estimated in damages at the par, and not at the rate of exchange.

Where a balance is due on account payable in a foreign country, the creditor if he sues for the same in another country is entitled to be paid at the rate of exchange. In other words, he is entitled to have the money replaced, where it was agreed to be paid.

Semble.—That there is no difference between bills of exchange and other contracts for payment of money in a foreign country, as to the right to damages to replace the money, where it was payable, except that the usage of trade has fixed the rate of damages.

INDEBITATUS assumpsit for a balance of accounts. The declaration also contained the money counts. Plea—general issue.

At the trial it appeared, that the plaintiffs were merchants at Trieste, in Austria, and the defendant a merchant in Boston. In December, 1836, the plantiffs, by their agent, Mr Trueman, a resident at Boston, advanced to the defendant the sum of £4565 sterling, by a bill drawn on Messrs. Baring, Brothers & Co., London, reimbursable to that house by a bill to be drawn upon the plaintiffs by that house, payable at Trieste. In consideration of the advance the defendant agreed to ship and did ship on board the bark Talent, a cargo, principally of sugars, consigned the plaintiffs at Trieste for sale. The bark sailed on the voyage and at the time of her arrival at Trieste in March, 1837, the market for this kind of sugars (Manilla sugars) was exceedingly depressed in consequence of some changes in the Austrian tariff of duties, and the uncommon embarrassment of the money market on the continent of Europe. The market for sugar continued to fall until the month of August, 1837; the bills drawn by Messrs. Baring & Co. for their reimbursement became due in June, 1837, and the sugars were sold in the month of April, 1837, at a price less than half of their invoice value. The defence at the trial was, that the sale was improperly made by the plaintiffs and the sugars were sacrificed in violation of their duty, if not in breach of their orders. In consequence of these disastrous sales, unexpected by the parties, the net proceeds fell far short of the advance money. This suit was brought for the balance; and it was agreed between the parties, that if the verdict was found for the plaintiffs, the money due should be fixed by

the parties, or by an assessor appointed by the court. The jury found a verdict for the plaintiffs.

The parties afterwards agreed as to the amount due, except as to a single item; and that was, whether the defendant should be charged for the balance according to the par of exchange, or the actual rate of exchange, between Boston and Trieste, at the time of the verdict.

The point was shortly spoken to by *C. G. Loring* and *Sprague* for the defendant, and by *S. D. Parker* and *Choate* for the plaintiff. The cases of *Smith v. Shaw*, (2 Wash. Cir. R. 167); *Adams v. Cordis*, (8 Pick. R. 260), and *Lanusse v. Barker*, (3 Wheat. R. 101), were cited.

Story J.—Upon this point I have wished for a little time for reflection, although at the argument I ventured to express what was the inclination of my opinion. In all cases, which respect the daily transactions of commercial men, I feel a great desire not to interfere with the known and settled habits of business; and should rather incline to follow the usage, if any, than to form a new rule of my own. No settled usage has been shewn; and, therefore, the rule must be settled upon principle.

I take the general doctrine to be clear, that whenever a debt is made payable in one country, and it is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country, where it ought to have been paid, with interest for the delay; for then, and then only, is he fully indemnified for the violation of the contract. In every such case the plaintiff is, therefore, entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to, or subtracted from, the amount, as the case may require, in order to replace the money in the country, where it ought to be paid. It seems to me, that this doctrine is founded on the true principles of reciprocal justice.

The question, therefore, in all cases of this sort, where there is not a known and settled commercial usage to govern them, seems to me to be rather a question of fact than of law. In cases of accounts and advances, the object is to ascertain where according to the intention of the parties the balance is to be repaid, in the country of the creditor, or of the debtor. In *Lanusse v Barker*, (3 Wheat. R. 101, 147), the Supreme Court of the U. States seem to have thought, that where money is advanced for a person in another state, the implied understanding is to replace it in the country, where it is advanced, unless that conclusion is repelled by the agreement of the parties, or by other controlling circumstances. Governed by this rule, the money being advanced in Boston, so far as it was not reimbursed out of the proceeds of the sales at Trieste, would seem to be proper to be repaid in Boston. In relation to mere balances of account between a foreign factor and a home merchant, there may be more difficulty in ascertaining, where the balance is reimbursable, whether where the creditor resides, or where the debtor resides. Perhaps it will be found, in the absence of all controlling circumstances, the truest rule and the easiest in its application, that advances ought to be deemed reimbursable at the place, where they are made, and sales of goods accounted for at the place, where they are made, or authorized to be made.[2] Thus, if a consignment is made in one country for sales in another country, where the consignee resides, the true rule would seem to be to hold the consignee bound to pay the balance there, if due from him, and if due to him on advances there made, to receive the balance from the consignor there. The case of *Conseequa v. Fanning*, (3 John. Ch. R. 587, 610,) which was reversed in 17 John. R. 511, proceeded upon this intelligible ground, both in the Court of Chancery and in the Court of Errors and Appeals, the difference between these learned tribunals not being so much in the rule, as in its application to the circumstances of that particular case.

I am aware, that a different rule in respect to balances of account and debts due and payable in a foreign country was laid down in *Martin v. Franklin*, (4 John. R. 125,) and *Scofield v. Day*, (20 John. R. 102;) and that it has been followed by the Supreme Court of Massachusetts, in *Adams v. Cordis*, (8 Pick. R. 260.) It is with unaffected diffidence, that I venture to express a doubt as to the correctness of the decisions of these learned courts pon this point. It appears to me, that the

[1] Mr Justice Baldwin decided the same point in *Woodhall v. Wagner*, (1 Baldw. R. 296, 302.)

[2] See Story on Conflict of Laws, s. 283, s. 284, s. 285. *Bainbridge v. Wilcocks*, (1 Baldw. R. 536.)

reasoning in 4 John. R. 125, which constitutes the basis of the other decisions is far from being satisfactory. It states very properly, that the court have nothing to do with inquiries into the disposition, which the creditor may make of his debt, after the money has reached his hands; and the court are not to award damages upon such uncertain calculations as to the future disposition of it. But that is not, it is respectfully submitted, the point in controversy. The question is, whether if a man has undertaken to pay a debt in one country, and the creditor is compelled to sue him for it in another country, where the money is of less value, the loss is to be borne by the creditor, who is in no fault, or by the debtor, who by the breach of this contract has occasioned the loss. The loss, of which we here speak, is not a future contingent loss. It is positive, direct, immediate. The very rate of exchange shows, that the very same sum of money paid in the one country is not an indemnity or equivalent for it, when paid in another country, to which by the default of the debtor the creditor is bound to resort. Suppose a man undertakes to pay another $10,000 in China, and violates his contract; and then he is sued therefor in Boston, when the money, if duly paid in China, would be worth at the very moment 20 per cent. more than it is in Boston; what compensation is it to the creditor to pay him the $10,000 at the par in Boston? Indeed, I do not perceive any just foundation for the rule, that interest is payable according to the law of the place, where the contract is to be performed, except it be the very same, on which a like claim may be made as to the principal, viz. that the debtor undertakes to pay there, and therefore is bound to put the creditor in the same situation, as if he had punctually complied with his contract there.

It is suggested, that the case of bills of exchange stands upon a distinct ground, that of usage; and is an exception from the general doctrine. I think otherwise. The usage has done nothing more than ascertain, what should be the rate of damages for a violation of the contract generally, as a matter of convenience and daily occurrence in business, rather than to have a fluctuating standard, dependent upon the daily rates of exchange, exactly for the same reason, that the rule of deducting one third new for old is applied to cases of repairs of ships, and the deduction of one third from the gross freight is applied in cases of general average. It cuts off all minute calculations and inquiries into evidence. But in cases of bills of exchange drawn between countries, where no such fixed rate of damages exists, the doctrine of damages, applied to the contract, is precisely that, which is sought to be applied to the case of a common debt due and payable in another country; that is to say, to pay the creditor the exact sum, which he ought to have received in that country. That is sufficiently clear from the case of *Mellish v. Simeon*, (2 H. Black. R. 378,) and the whole theory of re-exchange.

My brother, the late Mr Justice Washington, in the case of *Smith v. Shaw*, (2 Wash. Cir. R. 167, 168, in 1808,) which was a suit brought by an English merchant on an account for goods shipped to the defendants' testator, where the money was doubtless to be paid in England, and a question was made, whether, it being a sterling debt, it should be turned into currency at the par of exchange, or at the then rate of exchange, held, that the debt was payable at the then rate of exchange. To which Mr Ingersoll, at that time one of the ablest and most experienced lawyers at the Philadelphia bar, of counsel for the defendant, assented. It is said, that the point was not started at the argument, and was settled by the court suddenly without advancing any views in the support of it. I cannot but view the case in a very different light. The point was certainly made directly to the court, and attracted its full attention. The learned judge was not a judge accustomed to come to sudden conclusions, or to decide any point, which he had not most scrupulously and deliberately considered. The point was probably not at all new to him; for it must frequently have come under his notice in the vast variety of cases of debts due on account by Virginia debtors to British creditors, which were sued for during the period, in which he possessed a most extensive practice at the Richmond bar. The circumstance, that so distinguished a lawyer, as Mr Ingersoll, assented to the decision, is a farther proof to me, that it had been well understood in Pennsylvania to be the proper rule. If, indeed, I were disposed to indulge in any criticism, I might say, that the cases in 4 John. R. 125, and 20 John. R. 101, 102, do

not appear to have been much argued or considered; for no general reasoning is to be found in either of them upon principle, and no authorities were cited. The arguments and the opinion contain little more than a dry statement and decision of the point. The first and only case, in which the question seems to have been considered upon a thorough argument, is that in 8 Pick. R. 260. I regret, that I am not able to follow its authority with a satisfied assent of mind.

But in the present case it strikes me, that the circumstances do not require me to dispose of the more general question, although it is impossible not to feel, that it is fully before the court. My opinion is, that in the present case the advances being made in Massachusetts, if the goods sent to Trieste did not fully reimburse the amount, the balance was properly due and payable in Massachusetts. There is not the slightest evidence to prove, that the advances were to be repaid at Trieste, if the consignment did not fully reimburse them. In truth, neither party contemplated the probability, I had almost said the possibility, of the fund not being more than adequate to repay all the advances. The contract then appears to me to be in substance this, that the creditors shall be at liberty to reimburse themselves from the proceeds of the sales at Trieste for the advances. The personal obligation to repay the advances in any other manner was not stipulated for. The parties left the rest to the silent operation of law. And my judgment is, that upon the just principles of law, applied to the contract, the advances, so far as they should not be reimbursed out of the sales of the cargo, were payable, not at Trieste, but at Boston, the place were they were made. In this view of the matter I remain of the opinion, which was intimated at the argument, that the plaintiffs are entitled only to the balance due at the par of exchange.

SUPREME JUDICIAL COURT.

NORTHAMPTON, MASS., APRIL TERM, 1839.

Allen et al. v. Wells et al., Assignees of Clark.

The attachment of the separate estate of an individual partner by a creditor of the firm is not defeated by subsequent attachments by creditors of the individual partner, nor by a subsequent assignment of such individual partner under the statute of 1836, ch. 238—this although his separate property be insufficient for the payment of his separate debts.

Semble.—That such an attachment by a creditor of the firm would be defeated by the subsequent insolvency of the individual partner, under the statute of 1838, ch. 163.

THIS was an action of *special assumpsit*, to recover the amount of an execution of the plaintiffs against F. A. Birge & Co. The plantiffs, in the writ against F. A. Birge & Co., had attached the separate estate of Clark, one of the copartners of the firm. Subsequently and before judgment, Clark made an assignment to the defendants under the statute of 1836, and his private property proved insufficient for the payment of his separate debts. Within thirty days after judgment, the plaintiffs being about to levy their execution on the separate property attached, the defendants promised them, in consideration of their forbearing to do so, that they (the defendants) would pay the amount of the execution, if, by law, such levy, if completed, would be valid and effectual as against the separate creditors of Clark, claiming under the assignment. The declaration was on this promise. The defendants demurred generally, and the plaintiffs joined in the demurrer.

The case was argued at great length, Hampshire, Franklin, and Hampden, ss. September Term, 1838, by

Alvord for the plantiffs, and by

Wells for the defendants.

The following opinion of the court was read at the present term as drawn up by

DEWEY J.—The plaintiffs by their attachment of the property of Alanson Clark, one of the members of the copartnership firm of F. A. Birge & Co., contend for such a lien upon certain real estate of the said Alanson Clark, as subjected it to be seized on an execution for a debt due them from the firm of F. A. Birge & Co., and if such lien existed at the time the plaintiffs were about to levy their execution on the estate, the plaintiffs will be entitled to recover in the present action.

The defendants insist, that this lien was discharged by an assignment made by Clark, of all his property in trust for his creditors, under the provisions of the statute of 1836,

ch. 238, which assignment was made after the attachment by the plaintiffs on their original suit, but before the issuing of their execution.

As by the provisions of the statute authorizing this assignment, all the creditors of Clark, who had not already instituted suits, were prevented from so doing after the execution of the assignment, it would seem that the rights of any creditor, claiming by priority as a separate creditor to hold the separate estate of Clark, as a fund first to be applied to the payment of his separate creditors, might be properly insisted upon by the assignees in his behalf, and upon the same grounds, as though a suit had been instituted by such separate creditor, and the same property had been attached by him, as had been previously attached in the suit of the present plaintiffs as creditors of Birge & Co.

The question then arises, whether, by the law of this commonwealth, an attachment of the private estate of one of several copartners, for a debt due from the copartnership, is valid as against an after attachment of the same estate by a separate creditor of the same copartner?

This point was supposed to have been settled by the decision of this court, in the case of *Newman v. Bagley*, (16 Pick. 570.) But the counsel for the defendants being desirous of a re-examination of this question, we have been disposed, considering the practical importance of the question under consideration, to revise that opinion with the aid of the very full and elaborate arguments of the counsel in the present case.

The conflicting claims of copartnership and separate creditors have been a fruitful source of litigation in England. The questions more usually have arisen under the bankrupt law, and the decisions are mostly to be found in the Chancery Reports, but not exclusively so. The great number of cases, in which this question has arisen, shows very clearly that there could have been, at the time, no very well defined general principles, known and acknowledged as such, applicable to the adjustment of these conflicting rights. Even as regards the joint property of partners the rule has varied. By the rules of law, as formerly held in England, the sheriff, under an execution against one of two copartners, took the partnership effects and sold the moiety of the debtor, treating the property, as if owned by tenants in common. *Heydon v. Heydon*, (1 Salk. 392.) *Jacky v. Butler*, (2 Ld. Raymond, 871.) But the principle is now well settled in England, both at law, and in equity, that a separate creditor can only take and sell the interest of the debtor in the partnership property, being his share upon a division of the surplus, after discharging all demands upon the copartnership. *Fox v. Hanbury*, (Cowper, 445.) *Taylor v. Fields*, (4 Ves. Eq. 396.) The same fluctuation in the rule as to partnership property, has existed in the United States. The rule of selling the moiety of the separate debtor in the partnership property, on an execution for his private debts, formerly prevailed in several states of the Union, but the later decisions have changed the rule, and that now more generally adopted is in accordance with the one prevailing in England and which has been already mentioned. The state of Vermont still adheres to the doctrine that partnership creditors have no priority over a creditor of one of the partners, as to the partnership effects. *Root v. Shepardson*, (2 Vt. R. 120.) The rule in Massachusetts, giving a priority to the partnership creditor, in such cases, was settled in the case of *Pierce v. Jackson*, (6 Mass. R. 242,) and has been uniformly followed since. The effect of the rule that the only attachable interest of one of the co-partners, by a separate creditor, was the surplus of the joint estate, which might remain after discharging all joint demands upon it, necessarily was to create a preference in favor of the partnership property, and this effect would be produced although the original purpose of the rule might have been the securing the rights of the several co-partners, as well as those of their joint creditors. Whatever may have been the object of the rule, the rule itself is now to be considered as well settled, as to the appropriation of partnership effects.

The defendants insist, that by law a similar priority exists in favor of a creditor of of one member of a copartnership, as to the separate property of his debtor. Upon this point there has been not only a direct contrariety in the decisions as to the principle itself, but where the principle has been admitted, various exceptions have been engrafted upon the rule.

The more ancient doctrine, as established

by Lord Hardwicke, was that separate creditors had a prior claim upon the separate estate. This principle was controverted by Lord Thurlow, who allowed joint creditors to take their dividends upon the separate estate of the partners. In the time of the Chancellorship of Lord Loughborough, the doctrine was again asserted that the separate estate was first to be applied to the separate debts. Such has been the state of this question, in the English courts, as declared by Lord Eldon, in *ex-parte Clay*, (6 Ves. 813.)

The want of uniformity in the application of the rule, as well as serious doubts in his own mind as to its utility, are plainly suggested by Lord Eldon in *Dutton v. Morrison*, (17 Ves. 205.) In the case of *ex-parte Elton*, (3 Ves. 238,) which is usually relied upon as having re-established the rule in England, making the separate property first applicable to the payment of the separate debts, it seems to be admitted, that a joint creditor, who sues out the commission of bankruptcy againt a separate debtor, is entitled to share rateably with the separate creditors in the distribution of the separate property. Subsequent English cases more explicitly state the rule of distribution to be that of priority in favor of the separate estate. Such was the doctrine there, as was declared by Chancellor Kent, in the opinion pronounced by him in *Murray v. Murray*, (5 Johns. Ch. R. 60,) where the leading English cases up to that period, (1821) were fully considered by him.

But it would be found difficult to reconcile all the English cases and to maintain that since the time of Lord Loughborough to the present day there has been no departure in principle from the rule adopted by him. The learned American Commentator on Equity Jurisprudence, in noticing some of the later decisions, remarks, "that if the true doctrine be that avowed by Sir William Grant, in the case of *Devaynes v. Noble*, (1 Meriv. 529,) and afterwards affirmed by Lord Brougham, (2 Mylne and Keen,) that a partnership contract is several as well as joint, then there seems no ground to make any difference whatever, *in any case*, between joint and several creditors as to payment out of joint or separate assets." 1 Story's Equity, 626 in notes. It is not to be understood to be suggested, that Mr Justice Story doubts the existence of the rule in equity, that separate creditors are entitled to be first paid out of the separate estate. On the contrary, he distinctly affirms it. This principle has been directly recognized also in the cases of *Wilder v. Keeler*, (3 Paige, 167.) *Egberts v. Wood*, (3 Paige, 518.) *Hull v. Wood*, (2 McCord, 302.) *Woodruf v. Pricis, Ex'ors*, (3 Dessausure, 203. 2 Dessausure, 270.)

As authorities prescribing a rule to govern a court of equity in the distribution of the assets of an insolvent estate, these decisions would be entitled to much consideration.

But it is to be remarked that no cases from any of the states of the Union have been cited, where the question has arisen in a court of law, between different attaching creditors, and where an attachment or lien of a joint creditor upon the separate property of one of the partners, has been postponed or superseded by one subsequently made by a separate creditor of the same partner.

The better opinion would seem to be that it is in a court of equity only, that the joint creditor can be restrained from proceeding against the separate estate. Such was the opinion of the late Chief Justice Marshall as stated in the case of *Tucker v. Oxley*, (5 Cranch, 35.) So also in *McCullen v. Dashell*, (1 Harr. and Gill, 96,) it was said that at law the joint creditors may pursue both the joint and separate estate, unless restrained by a court of equity.

The same doctrine seems to be asserted by Mr Justice Story in his Commentaries on Equity, Vol. I., page 625, where he says, "the separate creditors of each partner are entitled to be first paid out of the separate effects of the debtor, before the partnership can claim any thing, which can only be accomplished by the aid of a court of equity, for at law a joint creditor may proceed directly against the separate estate."

It is urged, however, on the part of the defendants, that as this court, as a court of law, have long since recognized the principle that an attachment of the goods of a partnership, by a creditor of one of the partners, is not valid as against an after attachment by a partnership creditor, it should also adopt the converse of the proposition, giving a like preference to separate creditors as to the separate property. But we think there is a manifest distinction in the two cases. The restriction upon separate creditors as to the partnership property, arises not merely from

the nature of the debt attempted to be secured, but also from the situation of the property proposed to be attached. In such a case a distinct moiety or other proportion in certain specific articles of the partnership property cannot be taken and sold, as one partner has no distinct separate property in the partnership effects. His interest embraces only what remains upon the final adjustment of the partnership concerns.

But on the other hand, a debt due from the co-partnership is the debt of each member, who is liable to pay the whole amount of the same to the creditors of the firm. In the case of the co-partnership the interest of the debtor is not the right to any specific property, but to a residuum, which is uncertain and contingent, while the interest of one partner in his individual property is that of a present absolute interest in the specific property. Each separate member of the co-partnership being thus liable for all debts due from the co-partnership, and no objection arising from any interference with the rights of others as joint owners, it seems necessarily to follow, that his separate property may be well holden to be liable to be attached and held to secure a debt due from the co-partnership.

Upon a full consideration of the question arising in the present case, the court are of opinion that the rule at law was correctly stated in the case of *Newman v. Bagley*, and that the separate property of each member of a co-partnership is a liable to be attached for the debts due from the copartnership, and having been thus attached, the lien thus acquired is not to be defeated by a subsequent attachment by a separate creditor, or by an assignment under the statute of 1836, ch. 238. The recent statute enacted for the relief of insolvent debtors, (St. 1838, ch. 163,) has materially affected the lien acquired by attachment, and has in terms adopted as the rule for distributing the effects of insolvent debtors, that the nett proceeds of the joint property shall be appropriated to pay the joint creditors, and the nett proceeds of the separate estate of each partner shall be appropriated to pay his separate debts.

Judgment for the plaintiffs.

Burbank and others, App'ts. v. Whitney, Ex'or.

This was an appeal from the decree of the Judge of Probate of Hampden county, allowing the account of the appellee as executor of the last will of the late Rev Dr Pomroy, of West Springfield. The appellants were his heirs at law.

By the will, Dr Pomroy had given $4000 in specific legacies to the American Bible Society, the American Colonization Society, the American Home Missionary Society, and the American Education Society. Two of these Societies had been incorporated by the legislatures of other states; the others were merely voluntary associations.

The same will after giving other specific legacies bequeathed the *residue* of his property (about $30,000) to his wife, to be at her own use and disposal, "but whatever she might leave undisposed of at her death" he requested should go to the societies above named in equal proportions.

The wife died a short time before the testator. The executor had paid over the amount of the specific legacies to the treasurers of the societies respectively, and had also paid over to the treasurer of one of them a part of the *residuum*, and had charged and been allowed the amount of these payments in his account. The heirs at law, contended, among other things;

1. That a bequest to an unincorporated society, in trust for charitable purposes, was void.
2. That the whole property in the *residuum* with the power of absolute disposal, having been given to the wife, any limitation over of the same residuum was void; and that the societies could not take by virtue of the supposed limitation, though the wife died before the testator.

The case was argued, Hampshire, Franklin and Hampden, ss. Sept. Term 1839, by

Wells and *Alvord*, for the appellants, and

Strong, *Bates* and *Forbes* for the appellee.

The opinion of the court which was read, Hampden, April Term, 1839, as drawn up by Wilde J. established the following propositions.

1. That a legacy to an institution incorporated by the legislature of another of the United States was valid.
2. That a legacy in trust for charitable purposes to an unincorporated association, au-

thorized the executor to pay over the amount to the treasurer of such association and to charge the same in his account of administration.

3. That the limitation over of the residuum of the estate, after the death of the wife, would have been ineffectual and void, if the wife had survived the testator; and in such case, the same would have gone, if indisposed of, at her death, to her heirs, executor, or administrator, notwithstanding the limitation.
4. But as the wife died before the testator, and the legacy to her *lapsed* accordingly, the limitation over to the society could be supported, in the same manner as if no interest in the residuum had been given to the wife, and the same had been bequeathed immediately to the societies.

Decree of the Judge of Probate affirmed.[1]

SUPREME JUDICIAL COURT.

BANGOR, ME., JULY TERM, 1839.

Oakes v. Moore and others, Appellants.

Under the recent statute of Maine abolishing the court of common pleas and establishing district courts, an appeal, entered at a term subsequent to that in which the verdict was rendered, and to which term the action has been continued, will lie.

THIS case came before the full court on a motion, filed by the plaintiff, to dismiss the action, it having been brought into this court by appeal from the district court. The action was originally commenced in the court of common pleas, and was tried in that court at the January term last, and a verdict rendered for the plaintiff. The defendant thereupon filed a motion for a new trial. That motion not having been disposed of at that term the action was continued to the May term. On the first day of April the act of the last legislature went into force, "to abolish the court of common pleas and to establish district courts." By the act all matters and things pending in the former court were to have day in the latter, in the same manner that they would have had in the former had the act not been passed. By the fourth section of the act it was provided, that "any party aggrieved at the judgment of any district court in any personal action, wherein any issue has been joined," &c., "may appeal therefrom to the next supreme judicial court to be holden in the county," &c. It was also provided, that "in case such appeal was made by the defendant and the debt or damages recovered in the district court shall not be reduced, the plaintiff shall be entitled to recover double costs on the appeal, unless the justice before whom the trial in the district court was had, shall certify that there was just and reasonable cause for such appeal."

At the May term, after this new law went into force, the defendant's motion for a new trial was overruled, and judgment was rendered on the verdict, and the defendant claiming an appeal the court below granted the same, and the action was thereupon entered at this term in the supreme court. The only question which came before the court was whether, under these circumstances, an appeal lay.

John Appleton for the appellee.

A. G. Jewett for the appellant.

PER CURIAM.—We are of opinion, that the appeal was rightly granted, and therefore the motion to dismiss the action is overruled.[1]

Jackson v. Inhabitants of Hampden.

Where a committee has been appointed for the performance of a public duty a majority has power to act, but all must be notified to attend the meeting.

THIS was assumpsit for wages of the plaintiff as schoolmaster. The plaintiff having proved a legal engagement by the district agent, and a compliance with the requirements of the statute regulating schools, and a performance of his contract, the defendants rested their defence upon certain proceedings

[1] The decision related only to the personal property of the deceased, the court expressly waiving the questions in their application to the real estate, which will accordingly be settled in another trial in a different form.

[1] Several other actions were brought up under similar circumstances, in which similar motions were made. The case of *Mussey v. Turner*, was tried at the January term, and a verdict rendered for the plaintiff. The action was, thereupon, at the suggestion of the plaintiff, continued for judgment on account of prior attachments. At the May term the defendant claimed an appeal and it was granted, and this court sustained the appeal.

of a majority of the superintending school committee, by which they alleged that he was legally discharged from his engagement.

Complaint having been made to the committee that the plaintiff was "incapable and unfit to teach any school," a majority of the board, without notifying the other member, visited the school and after making a full inquiry and examination, they decided that the complaint was true, and thereupon dismissed him in the manner provided by statute. Notwithstanding these proceedings, the plaintiff continued to frequent the school house, during the term of his engagement, and instructed such as offered themselves, though some two or three scholars only usually attended.

At the first term, after this action was commenced, the defendants filed an offer to be defaulted, for a sum sufficient to cover his wages for the time previous to his dismission. At the trial of the action several objections were made to the proceedings of the committee, and were argued before the full court. The facts above stated, however, are the only ones rendered material by the opinion of the court.

The verdict was for a sum less than the offer to be defaulted for, and the plaintiff excepted.

A. G. Jewett, for plaintiff, contended, that all the committee should join in the dismission of the instructor, or at least all should be notified.

H. Hamblin for the defendants.

SHEPLEY J. delivered the opinion of the court, that the verdict ought to be set aside and a new trial granted. That in the case of committees appointed to transact public business, a majority had power to act, but that all must be notified and have an opportunity to act with the others; and although in this case the absent committee man who was not notified, testified that he was absent from town at the time and that he afterwards assented to the doings of the majority, upon becoming acquainted with them, yet this did not alter the case. The notice might have been left at his house which would have been sufficient.

Verdict set aside and a new trial granted.

MUNICIPAL COURT.

BOSTON, APRIL TERM, 1828.

Commonwealth v. Chandler.

To counterfeit any writing of a private nature, with a fraudulent intent, and whereby another may be prejudiced, is forgery at common law.

To forge a note or other private instrument in the name of a fictitious person, and for the purposes of fraud, is forgery under the statute.

Fraud and deceit are necessary ingredients of forgery, although it is not essential to the offence, that any person should be actually injured.

Where an indictment alleged, that the defendant, contriving and intending to deceive one S. G. P. and to induce him to employ the defendant, and to pay him a large sum of money as wages, exhibited and delivered to the said S. G. P. a certain pretended certificate of good character, it was held, that this did not constitute forgery.

FORGERY at Common Law. In the first count, the offence was charged as follows, viz.

That the defendant, on 17 March 1828, did utter and publish as true to one Samuel G. Perkins, a certain false, forged, and counterfeit certificate, purporting to be a certificate of one Mary Eaton, of the character of him said Vinson, with intent to induce the said Samuel to retain and employ the said Vinson as a domestic in said Samuel's family, at a stipulated rate of wages, and thereby to cheat and defraud the said Samuel, which certificate is as follows, to wit;

"March 17, 1828. This is to certify that Vinson Chandler is a good young man, attentive to his duties and a good disposition young man as I wish to have in my family. Mrs. Mary Eaton, Pearl St. Boston." And that he said Vinson Chandler then and there well knew the said certificate to be false, forged and counterfeit, against the peace and dignity of the Commonwealth.

The second count set forth, that the said Vinson Chandler, on said 17th March, contriving and intending to deceive Samuel G. Perkins Esq. one of the good citizens of this Commonwealth, and to induce him to employ and retain the said Vinson in his service, and to pay him a large some of money as wages, from month to month, did exhibit and deliver to said Samuel a certain false and pretended certificate of one Mary Eaton, purporting to be the certificate of said Mary, that he said Vinson was attentive to his duties and of a good disposition, and which said false and pretended certificate is as follows:

(as in the first count,) which said certificate he said Vinson then and there well knew to be false and pretended, against the peace of the said Commonwealth.

Upon the prisoner's arraignment, he pleaded guilty: and the court took time to consider the sufficiency of the indictment. Upon the 12th, he was brought into Court, and ordered to be discharged.

THACHER J.—The first question which arises upon this record is, whether judgment can be rendered against the defendant as for forgery, at common law? If judgment can not be rendered as for a forgery: is any offence sufficiently described, to authorize a judgment to be rendered against the defendant, as for a misdemeanor?

1. Forgery at common law is, in this Commonwealth, as in England, a misdemeanor. For a long time, this offence at common law was limited to the false fabrication of instruments of a public nature, or to those of peculiar solemnity, as records, deeds, wills, and other instruments under seal: and it was doubted, whether it extended to promissory notes of hand, acquittances, and other private instruments prejudicial to individuals. But it was settled by *Ward's case*,* and for more than a century, it has been established law, both in England and in this commonwealth, that to counterfeit any writing of a private nature, with a fraudulent intent, and whereby another may be prejudiced, is forgery at common law.

Bacon Abr. tit. Forgery, B, Russell on Crimes, 1467. 2 Ld. Raymond 1462.

In the case of *Henry Reed*, who was tried at this present term, for altering two forged promissory notes of hand for the payment of money, in the name of James Smith, it appeared at the trial, that no such person as James Smith was in existence; and upon that ground it was denied by D. A. Simmons, Esq. the defendant's counsel, that the offence was a forgery within the Statute of 1804, Ch. 120. The indictment concluding "against the peace and the form of the Statute" &c. a general verdict was, under my instructions, found against the defendant. Upon looking at the authorities, it appeared to be well settled, that to forge a note or other instrument, in the name of a fictitious person, and for the purpose of fraud, is a forgery under the Statute in England, and undoubtedly is so by the Statute of this Commonwealth. Russell on Crimes, 1426. Foster's Crown Law 116—Anne Lewis' case. Fraud and deceit are the chief ingredients of forgery, whether by Statute or at common law: it is not essential to the offence, that any person should be actually injured, but there must be the intent to deceive: it cannot, therefore, be material, whether the fraud should be effected, by using the name of a real or of a fictitious person. Simmons did not afterwards prosecute his motion, and Reed was sentenced under the Statute.

2. If it had been alleged in this indictment, that the defendant fabricated or uttered the false certificate in this case, with the evil intent to be retained in the service of Samuel G. Perkins, that after being so retained, he might fraudently convert to his own use the money or goods of said S. G. P. without his knowledge, and against his will; I should have considered it a misdemeanor, and upon conviction, either by verdict, or confession, he would be punishable for the offence: because this would shew an actual intention to defraud, coupled with an act done in pursuance of such unlawful intent.[1] Such evil design is not charged in either of the counts of this indictment. For it does not follow, that because the defendant meant, as is alleged in the first count, by uttering this letter, to induce Mr Perkins to retain and employ him as a domestic servant, that he had the further unlawful design to defraud Mr Perkins of his money or goods. He might have adopted this course to get into the service of a good master, and it is not impossible, although the act was extremely indiscreet, that he might have intended to be a faithful servant.

The intent, as alleged in the second count, was to "deceive Mr Perkins, and to induce him to employ and retain the defendant in his service, and to pay him large

* 12. Geo. 1.

[1] Salk. 375. Unless the falsity tend to the prejudice of another's right, it is not forgery—Where the obligee of a bond lessened the sum in the obligation it was considered to his own prejudice and not, forgery, Noy, 99. It was held by the twelve judges, in the case of *Parkes and Brown*, East P C. 964, that where one uttered *his own note*, but in the name of another, and as the note of that other, it was forgery; and it being in the same name as his own, could not make any difference.

wages from month to month." But it is not alleged, that the defendant was not capable of making a good servant, or of deserving and earning large wages; nor that he did not possess such character as is described in the writing, and therefore it does not follow from any thing alleged, that Mr Perkins would necessarily have been prejudiced by taking the defendant into his service. The paper is a false token: and if by the unlawful use of it, the defendant had defrauded any one of his money or goods, it would have been a cheat, and he would have been subjected to a heavy punishment.

Being for these reasons of opinion, that this instrument does not come within the description of any of the instruments, which are enumerated in the Statute, nor within any case of forgery at common law: and that no sufficient offence is described in either count of the indictment, the judgment must be arrested and the prisoner be discharged.

Prisoner discharged.

OBITUARY NOTICES.

In Thomaston, Me. on the 15th of June, William J. Farley, Esq. a distinguished member of the Lincoln Bar, aged 36.

At his residence, in Athens, Geo. on Friday night, the 21st of June, the Hon. Augustin S. Claxton.

Judge Claxton was born in the State of Virginia, on the 27th Nov. 1783. He completed his education at the University of Georgia in 1804.

Having pursued the study of the law under the late Judge Carnes, he entered in early life upon its practice, and was successful, and rose to distinction at the bar. He was chosen a representative of his fellow citizens, first in the lower and subsequently in the higher branch of the state legislature, where he imparted the impress of his mind to many of the laws under which we now live.

He was thrice elected judge of the superior court of the Western Circuit, which post he filled with honor and dignity.

In 1832 he was elected a representative in Congress for the state of Georgia, of which body he became a distinguished member. At the close of the last term for which he was elected, in consequence of his declining health, he retired from public life, except the trusteeship of the University of Georgia, which station he has filled from a very early period, and had doubtless been one of the most efficient and zealous supporters of the institution, as well as of the cause of education in general.

He was highly distinguished for his correct literary taste and chaste flowing wit, which his numerous political and other essays abundantly prove.

In private life and his social relations, the subject of this notice was characterised by the greatest affection and the most ardent desire to minister to the happiness of those who were dependent upon him.

For many years Judge Claxton had been exceedingly sceptical upon the subject of the christian religion. His mind was, however, turned to its more calm and deliberate investigation during his long and protracted illness. Then it was that he regarded his previous neglect as the greatest ingratitude, and under a deep conviction of its truth and of his former errors, he made a public profession of his faith in Christ, by uniting with the Methodist Episcopal Church in August, 1838, which he steadfastly and consistently maintained till his death.

Sensible that his former opposition to christianity might have infected the minds of many with whom he had associated, his most ardent desire appeared to be to undo the evils of his former life in this regard.

The closing scene of his life was one of extraordinary christian triumph. He entertained the exercise of his intellectual powers with surprising vigor to the last, and many of his dying expressions will long be remembered by his family and friends, as precious memorials of the power of Divine Grace, in cheering the spirit in its passage to the tomb.

Thus lived and died one among the most talented and distinguished citizens of the state of Georgia, whose foibles will be forgotton, but whose many virtues will be remembered and cherished long after this brief obituary shall have been laid away among the things that were. [Athens (Geo.) Banner.

At Port au Prince, Hayti, in February last, Prince Saunders, Esq., attorney-general for the government of Hayti.

Mr Saunders was one of the best educated colored men ever reared in this country. He was born in Thetford, Vermont, where he

received a good English education. About the year 1806, he was employed to teach the free colored school at Colchester, Conn., and was subsequently, it is believed, graduated at Dartmouth college, after which he taught in Boston. From Boston he went to Hayti, where he was first employed by Christophe, "the first crowned monarch of the new world," as his agent to improve the state of education in his dominions, and was sent to Europe to procure means of instruction. In England he was treated as minister plenipotentiary, and his cognomen being mistaken for his title, he was conversant with the nobility, and admitted to the society of the King, and quite at home at the house of Sir Joseph Banks, then President of the Royal Society.

From some cause or other, his conduct in Europe did not please his royal master, and on his return home, he was dismissed from his employment. After remaining a short time in Hayti, he returned to this country, studied divinity, and at one time officiated in a church in Philadelphia.

How long he remained here the writer knows not, but he removed hence to Hayti again, and at the time of his death was the attorney general of the government. As he was an extraordinary man, it is hoped this notice of his death may be the means of calling forth further particulars respecting him. [N. Y. Commercial.

MISCELLANY.

STATISTICS OF CRIME IN GREAT BRITAIN.

The criminal tables for 1838, which have recently been laid before Parliament, have a most important bearing on several questions to which public attention has long been earnestly turned. Of these tables an analysis appears below, and the results brought out are pregnant with instruction, from the light which they throw upon the connection between ignorance and crime. It appears that in England, out of 23,094 persons committed for offences against the law in 1838, there were, taking males and females together, 7,943 who could neither read nor write, and 12,334 who could read and write but imperfectly. As, however, no one can be said to be educated even in the lowest degree, who cannot read and write perfectly, we are entitled to consider both the above classes as one, and thus we have 20,277 of the whole 23,094 English criminals—about eightyeight per cent.—who were uneducated.

Another important result at which we arrive from this analysis is this, that of this vast amount of crime the portion committed by persons who had been educated beyond reading and writing is so small as, we venture to say, must astonish even the most enthusiastic believers in the power of education to restrain crime. Of this class of offenders the total number in England during the period of one year was *seventynine*, and in Scotland *ninetythree!* And when we come to look into the charges against them, we find that a great proportion of these are, comparatively, of a trivial description, such as common assaults, breaches of the peace, &c.

It appears that in the year 1838 there were accused of all kinds of offences—

In England,	23,094	persons.
Scotland,	3,418	do.
Ireland,	15,723	do.
	42,235	

Of these there were charged with:—

	England.	Scotland.	Ireland.
Offences against the person	1,859	787	4,325
Offences against property with violence	1,538	577	610
Offences against property without violence	18,278	1,588	7,436
Malicious Offences against property	89	57	122
Forgery, and Offences against the Currency	503	112	194
Other Offences not included above	827	297	3,036
	23,094	3,418	15,723

The ages of persons accused were—

	England.		Scotland.		Ireland.	
Years.	Males.	Females.	Males.	Females.	Males.	Females.
12 *	317	49	58	16	103	20
12 to 16	1,933	358	363	66	698	163
16 to 21	5,562	1,165	700	199	2,409	959
21 to 30	5,935	1,280	738	268	4,217	1,585
30 to 40	2,733	673	407	140	1,991	628
40 to 50	1,226	396	144	67	1,000	275
50 to 60	545	146	59	29	310	
Above 60	289	77	18	8	101	
†	365	45	117	16	935	174
	18,905	4,189	2,605	809	11,764	3,959

* And under.

† Age not ascertained.

The degree of instruction when committed:—

	England.		Scotland.	
	Males.	Females.	Males.	Females.
Neither read nor write	6,342	1,601	353	198
Read and write imperfectly	10,008	2,326	1,529	541
Read and write well	2,051	206	569	61
Superior instruction	74	5	91	2
Instruction not ascertained	430	51	67	7
	18,905	4,189	2,609	809

The offences charged in England and Scotland against persons instructed beyond reading and writing were—

	England		Scotland.	
	Males.	Females.	Males.	Females.
Murder	1		1	
Stabbing at, Stabbing and Wounding	2		2	
Manslaughter	4			
Culpable Homicide			5	
Attempt to procure miscarriage	1			
Assault, with attempt to commit Unnatural Misdemeanors	1			
Assault with intent to Carnally Abuse	3		1	
Bigamy	2			
Assaults, Common	9	1	35	
Breaking into Shops, &c.	1		3	
House Stealing	1			
Larceny in Dwelling-houses	1			
——— from the Person	1			
——— by Servants	3	1		
——— Simple	11	1	14	1
Stealing Fixtures	1			
Embezzlement	10		5	
Stealing Letters	1			
Receiving Stolen Goods	1		3	
Fraud	4	2	4	
Arson			2	
Sending Letters Threatening to Burn Houses	1			
Other Malicious Offences			2	1
Forgery, and Uttering Forged Instruments	6		9	
Breach of the Peace	7		4	
Keeping Disorderly House	1			
Misdemeanors not otherwise described	1			
Prison Breaking			1	
Total	74	5	91	2

The relative proportions of accused persons with reference to their intellectual condition, were,—

	England.	Scotland.
Unable to read and write	34.40	16.12
Able to read and write imperfectly.	53.41	60.56
Able to read and write well	9.77	18.43
Instruction superior to reading and writing.	0.34	2.72
Instruction not ascertained	12.08	2.17
	100.00	100.00

The classification with reference to intellectual condition is different in Ireland. The result was as follows;—

	Males.	Females.
Neither read nor write	4.537	2.271
Read only	1.947	.826
Read and write	4.160	.567
Instruction not ascertained	1.120	.295
	11.764	3.959

The tables are not framed so as to show these proportions with respect to convictions.

The number executed was, in all 1838:—

	England.	Scotland.	Ireland.
Murder	5	1	3
Attempt to Murder	1	...	...
Total.	6	1	3

Altogether ten persons, or one in 2,648,600 of the population.

Can there be, asks an English writer, a stronger or more decisive proof than is afforded by these tables, both of the great moral effect which is produced by education, and the lamentable want of it which exists in Great Britain, boasting, as it does, of its high civilization, its social blessings, its religious character? Facts, such as those which are now before us, should make the wealthy and influential classes of the community blush for the cruel neglect with which they have hitherto treated their poorer brethren with respect to mental and moral cultivation. If crime be the consequence of ignorance, a heavy responsibility rests with those who might have removed that ignorance, and did it not. They may yet find that retributive justice, if slow, is not the less sure to overtake them. But be that as it may, it is now the duty of every man who sets a just value on knowledge and its attendant benefits, to exert himself, in his sphere, in order to procure for the people not merely education, but *such* an education as shall not interfere with the inalienable rights of conscience.

MONTHLY CHRONICLE.

MASSACHUSETTS.—In the Circuit Court of the United States, in Boston, several learned and interesting opinions have been delivered by Mr Justice Story. One of them will be found in the present number. The opinion of the court upon the claim of Broughton and others, in the case of the ship Nathaniel Hooper, is in type, but we are obliged to omit it until next month, as it was not delivered until a considerable part of the present number was printed, and its great length renders it impossible for us to present it to our readers immediately. In delivering this opinion, the learned judge had occasion to refer to the decision of Lord Stowell in the case of *The Martha* (3 Rob. 106, note), and expressed his regret, that the learned judge should have felt himself bound by the dry au-

thority of a decision of Sir James Marriott. A judge, he remarked, who held the situation immediately previous to Lord Stowell, a great many years, but who never gave a decision, that he was aware of, that any court would feel bound to follow; and a volume published by himself, established, if anything could, the utter worthlessness of his judicial opinions!

In the Boston Municipal Court, Warren Parmenter was tried for a violation of the license law of 1838. He was tried at the previous term, and the jury were unable to agree. The facts appeared to be plain enough, but it was understood that some one of the jury doubted the constitutionality of the law, and would not receive as binding the instructions of the court upon that point.

At the last trial Mr Hallett argued the constitutional question to the jury several hours, but the court instructed them that the law was constitutional. The case was committed to them on Saturday, the 20th ult., and after being out several hours, they came in with the statement that they could not agree. The court again sent them out and adjourned to the next (Sunday) morning. The jury then came in with the same statement that they could not agree, and the foreman handed a paper, of which the following is a copy, to the court—

"The majority of the jury in the case of Warren Parmenter ask leave to state that immediately on returning, they proceeded to ballot, and stood 11 to 1. Immediately before coming now into court, they again balloted with the same result.

"The dissenting juror stated to the jury that he is a dealer in the article of ardent spirits; that he is in the habit of selling it to his customers; and he has also stated to one of the jury, that if this law is to be enforced, he must give up his present business, as he could not support his family in that situation."

The papers were then taken from the jury and they were discharged.

New York.—In the city of New York the court of Oyer and Terminer, Inglis J. presiding, were occupied several days in the trial of Ezra White, charged with the murder of one Fitzpatrick. The following is a brief analysis of the case:

On the night of the 13th of February last, a man named Lawrence Gaffney, who had recently commenced keeping a public house in Boone street, invited some friends to a house-warming. About 3 o'clock in the morning, while his company were dancing and amusing themselves, the prisoner and three other young men went into the house uninvited, and two of them walked into a back room where the greater part of Gaffney's friends were. The prisoner had scarcely entered the house when one of Gaffney's friends suggested to the prisoner and his friends that they were intruding, and the prisoner replied, "I came here to make a muss, and I'll go when I d——n please."

Gaffney, who was then standing behind his counter, feared an affray would take place between the parties, and came from behind the counter with the intention of interposing between them. Almost at the same moment the prisoner made a push at one of Gaffney's party named McLany, and the latter pushed at him. Gaffney then rushed between them, and seized hold of the prisoner, and pushed him out of the house, and some person outside, supposed to be a watchman, closed the door, which opened into the street. The prisoner immediately pushed the door partly open again, and thrust in his hand with a knife in it, as if in the act of stabbing at some person. The door was again closed by a person inside, and again partly pushed open by the prisoner, who repeated the same manœuvre with his hand. In a moment or two after, the door was opened by some person inside, and one of Gaffney's party, named Fitzpatrick, stepped out on the stoop, and was instantly stabbed by the prisoner, in the groin, and fell to the ground mortally wounded, and died shortly after. The prisoner and his companions then ran away, and the ensuing day the prisoner and one of his companions of the night before, fled from New York in the steamboat to Boston, from whence they intended to go to Charleston, but were pursued by the police, and arrested in Boston, and brought back to New York.

There was a good deal of contradictory evidence as to the description of clothes worn by the prisoner on the night of the murder, and as to whether he had or had not been roughly treated by some of Gaffney's friends, not including Fitzpatrick, before he was put out of the house. But the evidence showed most indisputably that the prisoner had killed the deceased, in the manner we have described, and the only question which admitted of any doubt was as to what was the legal degree of crime which the homicide amounted to.

The prisoner was defended by the Messrs Graham. Of the trial a New York paper remarks as follows:—

Never, certainly, was a prisoner more ably defended. Not a stone has been left unturned—not a particle of testimony, which could by any possibility be perverted so as to tell in the prisoner's favor, but has been spread in its most magnified form before the jury. In the display of ability and legal acumen, for which the junior counsel, D. Graham, Jr., is so remarkable, he has even surpassed himself, and the distinguished reputation of the elder Graham has lost nothing in public estimation by the extraordinary effort made by him on the present occasion. Indeed, so completely were the audience carried away by the force of his argument and the power of his eloquence, that at the conclusion of his address to the jury, the court room resounded with the plaudits of assembled multitude, and notwithstanding the solemnity of the occasion, it was long before the officers could procure a due observance of order and regularity.

On the part of the prosecution the case has been conducted by the District Attorney, Mr Whiting,

with an ability never surpassed, if ever equalled in the history of the criminal jurisprudence of our city.

At a subsequent day the prisoner's counsel moved the court for time to prepare a bill of exceptions to the charge of the judge, and twentyfive days were allowed for that purpose.

In Malone, Franklin county, (N. Y.) William Pierce, a lad less than 17 years of age, has been convicted of the murder of his own father. The following testimony of the principal witness explains the whole transaction :—

Willard Johnson—Lives in the town of Moira, is acquainted with the prisoner, William Pierce, and was acquainted with Oliver W. Pierce, the prisoner's father, previous to his death. Witness and his son were at work with the prisoner and his father, on the 10th day of January last. A dispute arose between the prisoner and his father, at the house, in relation to prisoner having a horse to go to spelling school. Witness, his son and the prisoner went from the house to the field, about 40 rods from the house, where they were preparing a log heap for the purpose of making ashes, between 2 and 4 o'clock, P. M. Witness directed his son and the prisoner to cut a certain maple tree, to which prisoner replied he would not, and gave as a reason, "that the old man would not let him have a horse to go to spelling school." Witness advised him to be quiet, and to go about his work. About this time the father came up, and the dispute was renewed. The prisoner said to his father, you promised me a horse. The father denied it, and prisoner said "it is a d——d lie." On this the father threatened to flog the prisoner, and picked up a stick 3-4 of an inch through at the butt and about three feet long including the branches, and struck him with the switch end. After he struck him, prisoner stepped over the stick on which he was at work, and stood four or five seconds, raised his axe and advanced rapidly, three or four paces, and struck his father with the axe on the right breast. The father then turned the stick, and gave the prisoner a blow with the butt end. The prisoner then shouldered his axe, turned and went off; and the father exclaimed, "Johnson, he has killed me." Witness assisted him to the house. He died on Saturday the 12th. At the time the blow was given, witness stood about three paces from the prisoner.

The jury were out about three hours, and returned with a verdict of *Guilty*. Judge Willard on the ensuing Monday (8th ult.) passed sentence of death on the youth, naming 2d Sept. as the day of execution.

Ohio.—Heavy damages were awarded recently, in the Court of Common Pleas at Cincinnati, in a suit brought against the captain, clerk and mate of the steamboat Gazelle, for an assault and battery committed on a passenger, under the following circumstances:

Upon 3d June, 1837, the plaintiff took passage on the defendants' boat at Portsmouth, for Cincinnati. About one o'clock the next morning, the defendants caught the plaintiff, and dragged him to the side of the boat, where one of the defendants flourished what one of the witnesses thought a knife and used abusive and threatening language. Plaintiff was then forced to the stern of the boat, put in the yawl, taken by the mate toward the shore, beaten in the yawl, and before reaching the shore, was thrown into the river. When put into the yawl, the plaintiff requested defendants to give him his valise, containing clothes and letters of introduction to respectable persons in Cincinnati, which was refused. Plaintiff was left by the boat on the Kentucky shore, 60 miles from Cincinnati, about one o'clock at night. The plaintiff adduced the evidence of about a dozen of the most respectable gentlemen, physicians, and others, of his native county in New York, that he had always sustained a high character for integrity, correct bearing, and application to his studies and business.

The defence set up was that the plaintiff was a deck passenger, and that some man, wearing a drab coat, was seen to enter the cabin with his candle. Plaintiff when found had on a drab coat, but was not proven to be the man. It was then proposed to prove, by a custom of the river, that whenever a deck passenger entered the cabin, he was put on shore. The court in charging the jury stated that the defence only aggravated the case.

Verdict for the plaintiff, $6,766.

Mississippi. The Natchez Free Trader contains an account of a recent trial in Mississippi, in which the presiding judge came near getting into serious difficulty with the jury. The particulars of the affair were as follows:—Judge Shattuck instructed the jury on a point of law in some case pending. They brought in a verdict contrary to his instruction. He commented on their behaviour from the bench; and in the course of his remarks stated that "he had never before known a court and jury differ so widely on a mere question of law: that such an extraordinary state of things was calculated to subvert the ends of justice, and reflect disgrace on the country." The jury took up the impression that the judge intended to censure their conduct; and the latter hearing this called them back, and explained what he did say. A gentleman present contradicted the judge in his assertions, for which he was fined $100.

When the court adjourned, there was a gathering of something like a hundred persons in the street, and the judge was called upon to explain more fully his remarks. This he very properly declined, while surrounded by a mob, but on Friday morning addressed the people from the rostrum. He again disclaimed any personal allusions, but had no further explanation to make. If anything more was required of him, "he was prepared to abide the result, and offer himself a sacrifice in defence of those immutable principles of

law and justice by which he professed to be governed, and which he had solemnly sworn to support."

He was then applauded by those who, the evening before had been clamorous against him—and when the court opened, the gentleman who had contradicted the judge made a suitable apology and his fine was remitted. The court then proceeded quietly to business without further interruption.

COLLECTANEA.

Mr Brotherton, the sheriff of St Louis, recently attached the steamboat Gen. Brady, and placed his deputy, Mr Lacy, on board as a keeper. About 4 o'clock in the morning, discovering that the boat was raising steam, the keeper rushed to the pilot house and took possession of the wheel, but the pilot and hands overpowered him, and put off with the boat, deputy sheriff and all, for New Orleans. A considerable distance below Mr Lacy was put on shore.

Hon. Rice Garland, the member of Congress from the 3d district of Louisiana, while engaged in the trial of a cause somewhere in that state got involved in a dispute with George R. King, Esq , the opposing counsel, and in the excitement of the moment, struck him. The parties have since, as we learn, from the New Orleans papers, crossed over into Texas to settle their difficulties by a duel, with the understanding that it is not to cease till one or both are killed.

The following paragraph has been going "the rounds" of the newspapers:—Three young men were recently tried in Cataraugus county for shooting and mortally wounding a dog. The written verdict of the jury was—"All three guilty; the plaintiff's damages assessed at 6 pence; and each of the defendants to have another shot at the dog."

The Mayor of Philadelphia has ordered into custody Jacob Ridgway, Daniel Mann, Stephen Simpson, and some others, charged with being connected with the notorious Thomas W. Dyott in the swindling operations of the Manual Labor Bank. Several of the parties concerned, especially Mr Ridgway, are represented to be wealthy.

George Hess, Jr., of Easton, has been appointed Associate Judge of Northampton county, Pa., in place of Hon. David D. Wagener, resigned. Judge Wagener has fulfilled the duties of the office for upwards of forty years.

Benjamin Champneys, Esq. has been appointed by Gov. Porter, of Pennsylvania, President Judge of the Second District of that State, (Lancaster county,) in place of Oristus Collins.

Dr E. A. Theller, of 'patriot' notoriety, has been tried at Detroit, for violating the neutrality laws of the United States, and acquitted. Gen Donald McLeod, another 'patriot,' was also acquitted.

William H. Battle, Esq. has been appointed Reporter of the Decisions of the Supreme Court of North Carolina, in place of Thomas P. Devereux, Esq., resigned.

Dr Manners, a son-in-law of the late Dr Thomas Cooper of South Carolina, has undertaken, at the request of the family, to write a biography of that distinguished man.

Hon James Walker has resigned the office of judge of the third judicial district of Mississippi.

NEW PUBLICATIONS.

The Statutes at large of South Carolina; edited, under authority of the legislature, by *Thomas Cooper*, M.D., LL.D. Volume III, containing the acts from 1716, exclusive, to 1752, inclusive; and Volume IV, containing the acts from 1752, exclusive, to 1786, inclusive, arranged chronologically. Columbia, S. C. Printed by A. S. Johnston, 1838.

Laws of the State of Mississippi; embracing all acts of a public nature from January Session, 1824, to January Session, 1838, inclusive. Published by authority. Jackson: Printed for the State of Mississippi, 1838.

The Revised Statutes of the State of Indiana, adopted and enacted by the General Assembly at their twentysecond session. To which are prefixed the declaration of independence, the constitution of the United States, the constitution of the State of Indiana, and sundry other documents connected with the political history of the territory and State of Indiana. Arranged, compiled and published, by authority of the general assembly. Indianapolis: Douglass and Noel, printers, 1838.

The Law of Libel. Report of the Trial of Dr Samuel Thompson, for an alleged libel, before Judge Thacher, in the Municipal Court of Boston. April Term, 1839. Boston: Printed by Henry P. Lewis, 1839.

Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with remarks on Precedents and Authorities. Enlarged edition. By *Francis Lieber*. Boston: Chas. C. Little and James Brown, 1839.

The Law Library, edited by *Thomas J. Wharton*, Esq., of the Philadelphia bar. Nos. 67 and 72, containing—

An Elementary Compendium of the Law of Real Property, by *Walter Henry Burton*;

A Selection of Leading Causes on various branches of the Law, by *John William Smith*. Vol. II., Part I.;

A Practical Treatise on the Law of Trusts and Trustees. By *Thomas Lewin*; and

An Essay on Aquatic Rights. By *Henry Schultes*.

Term Reports in the Court of Queen's Bench, Bail Court, Court of Common Pleas, and Court of Exchequer. Part I. Hilary Term. London: Richard Pheney; Boston: Charles C. Little and James Brown.

The Practice of the Law in all its Departments, &c. By *J. Chitty*, Esq. Vol. IV. Philadelphia: T. and J. W. Johnson, successors to Nicklin and Johnson.

Reports of Cases decided in the Supreme Court of Pennsylvania. By *T. J. Wharton*. Vol. IV. Same.